91-1025

Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1991

HUMAN DEVELOPMENT ASSOCIATION,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

DISTRICT 6, INTERNATIONAL UNION OF INDUSTRIAL, SERVICE, TRANSPORT AND HEALTH RELATED EMPLOYEES,

Intervenor.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

WHETHER THE CONTINUED APPLICATION OF THE DUAL CARD DOCTRINE BY THE NATIONAL LABOR RELATIONS BOARD IS INCONSISTENT WITH THE DECISION OF THE SUPREME COURT IN *INTERNATIONAL LADIES' GARMENT WORKERS' UNION, AFL-CIO V. NLRB (BERNHARD-ALTMANN TEXAS CORP.)*, 366 U.S. 731 (1961) AND THE PURPOSE OF THE NATIONAL LABOR RELATIONS ACT TO PROMOTE INDUSTRIAL STABILITY.

LIST OF PARTIES

The parties to the proceedings below were Petitioner Human Development Association, Respondent National Labor Relations Board and Intervenor District 6, International Union of Industrial, Service, Transport and Health Related Employees.

RULE 29.1 DISCLOSURE

There are no parent companies or subsidiaries of Petitioner.

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DISTRICT 6, INTERNATIONAL UNION OF INDUSTRIAL, SERVICE, TRANSPORT AND HEALTH RELATED EMPLOYEES,

Intervenor.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

Petitioner, Human Development Association, prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit enforcing a decision and order of the National Labor Relations Board.

OPINIONS BELOW

The opinion of the District of Columbia Circuit Court of Appeals is reported at 937 F.2d 657 (D.C. Cir. 1991). It is reprinted, along with the judgment of the Court, in the Appendix hereto as App. A, *infra*, A-1 – A-49. The decision and order below of the National Labor Relations Board is reported at 293 NLRB 1228 (1989) affirming the decision of Administrative Law Judge Arthur A. Herman. Those decisions are reprinted in the Appendix hereto as App. B, *infra*, A-50 – A-109.

JURISDICTION

This case originally came before the District of Columbia Circuit Court of Appeals upon the petition of Human Development Association (hereafter "Petitioner") for review of an order of the National Labor Relations Board (hereafter "Respondent" or the "Board"), pursuant to Section 10(f) of the National Labor Relations Act, as amended (hereafter the "Act"), 29 U.S.C. Section 160(f). Respondent filed a cross-application for enforcement of its order pursuant to Section 10(e) of the Act, 29 U.S.C. Section 160(e).

By opinion dated and entered July 9, 1991, the Circuit Court granted Respondent's cross-application for enforcement and denied the petition for review. Petitioner's petition and suggestion for rehearing *en banc* was denied by orders dated and entered September 23, 1991. Those orders are reproduced in the Appendix hereto as App. C, *infra*, A-110 – A-112.

The jurisdiction of this Court to review the judgment and opinion of the District of Columbia Circuit is invoked pursuant to 28 U.S.C. Section 1254(1).

STATUTES INVOLVED

Section 8(a)(1), 8(a)(2) and 8(a)(3) of the National Labor Relations Act, as amended, 29 U.S.C. Section 158(a)(1), 158(a)(2) and 158(a)(3):

Section 8(a) It shall be an unfair labor practice for an employer –

> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7 [Section 157 of this title];
>
> (2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided*, That subject to rules and regulations made and published by the Board pursuant to Section 6 [Section 156 of this title], an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;
>
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in Section 8(a) of this Act [in this subsection] as an unfair labor practice) to

> require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in Section 9(a) [Section 159(a) of this title], in the appropriate collective bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in Section 9(e) [Section 159(e) of this title] within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided further,* That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

Section 8(b)(7)(C) of the National Labor Relations Act, as amended, 29 U.S.C. Section 158(b)(7)(C):

> Sec. 8(b) It shall be an unfair labor practice for a labor organization or its agents –
>
> (7) to picket or cause to be picketed, or threaten to picket or cause to be picketed, any

employer where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees, or forcing or requiring the employees of an employer to accept or select such labor organization as their collective bargaining representative, unless such labor organization is currently certified as the representative of such employees: . . .

(C) where such picketing has been conducted without a petition under Section 9 [Section 159(c) of this title] being filed within a reasonable period of time not to exceed thirty days from the commencement of such picketing: *Provided,* That when such a petition has been filed the Board shall forthwith, without regard to the provisions of Section 9(c)(1) [Section 159(c)(1) of this title] or the absence of a showing of a substantial interest on the part of the labor organization, direct an election in such unit as the Board finds to be appropriate and shall certify the results thereof: *Provided further,* That nothing in this subparagraph (C) shall be construed to prohibit any picketing or other publicity for the purpose of truthfully advising the public (including consumers) that an employer does not employ members of, or have a contract with, a labor organization, unless an effect of such picketing is to induce any individual employed by any other person in the course of his employment, not to pick up, deliver or transport any goods or not to perform any services.

STATEMENT OF THE CASE

In 1981, District 1199, National Union of Hospital and Health Care Employees, R.W.D.S.U., AFL-CIO filed an unfair labor practice charge alleging that Petitioner had improperly recognized and entered into a collective bargaining agreement with Intervenor at a time when it did not represent an uncoerced majority of Petitioner's employees. On the basis of that charge, the NLRB issued a complaint on February 3, 1982, alleging Petitioner violated Section 8(a)(1), (2) and (3) of the National Labor Relations Act.

A hearing in the case was conducted by Administrative Law Judge (hereinafter "ALJ") Arthur A. Herman on November 28, 1983 and on May 4, 1984.

On April 4, 1985, ALJ Herman issued his decision finding Petitioner in violation of Section 8(a)(1), (2) and (3) of the Act for recognizing and entering into a collective bargaining agreement with District 6 at a time when District 6 did not represent a majority of Petitioner's employees. In his decision, ALJ Herman relied on the dual card doctrine in finding that District 6 did not have a majority of cards. The dual card doctrine provides that when an employee signs authorization cards for more than one labor organization, those cards cannot be counted toward determining whether a labor organization has the requisite majority status before voluntary recognition can be extended. In the instant case, the Board found that six cards presented by District 6 in establishing its majority status were invalid because those six employees had also signed cards for District 1199. Accordingly, it found that Petitioner had unlawfully

granted recognition to District 6 even though Petitioner had no knowledge of the existence of the dual cards or that District 1199, as well as District 6, was organizing its employees. Petitioner and District 6 each filed exceptions to the ALJ's decision.

On July 31, 1986, the Board remanded the case for a determination of whether it could properly assert jurisdiction over Petitioner.

On June 30, 1987, ALJ Herman issued a supplemental decision pursuant to the Board's order of remand. ALJ Herman reaffirmed his original conclusion that the Board should assert jurisdiction over HDA.

On May 22, 1989, the Board issued its decision affirming the decision of the ALJ as modified.

On September 7, 1989, the petition for review was docketed with the District of Columbia Circuit Court. On September 21, 1989, the Board filed a cross-application for enforcement of its order. On October 3, 1989, the Intervenor filed its motion to intervene which was granted by the Circuit Court on October 12, 1989. On July 9, 1991, the Circuit Court granted Respondent's cross-application for enforcement and denied the petition for review. Judge Edwards dissented stating the Board's continued application of the dual card doctrine was inconsistent with its decision in *Bruckner Nursing Home*, 262 NLRB 955 (1982) and that the Board needed "to explain coherently the legal standard it purports to apply."[1] (App. A at 47).

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[1] As used herein, "App. ___ at ___" refers to pages of the Appendices annexed hereto.

Petitioner's petition and suggestion for rehearing *en banc* was denied by orders dated and entered September 23, 1991.

REASONS FOR GRANTING THE WRIT

THE CONTINUED APPLICATION OF THE DUAL CARD DOCTRINE IS INCONSISTENT WITH THE DECISION OF THE SUPREME COURT IN *INTERNATIONAL LADIES' GARMENT WORKERS' UNION, AFL-CIO V. NLRB (BERNHARD-ALTMANN TEXAS CORP.)*, 366 U.S. 731 (1961) AND THE PURPOSE OF THE NATIONAL LABOR RELATIONS ACT TO PROMOTE INDUSTRIAL STABILITY

Ignoring the admonition of this court and the Congressional statutory scheme establishing its powers, the NLRB by its decision has set back industrial labor stability by undermining the process of voluntary recognition of labor organizations upon proof of majority status.

Rule 10.1(c) of the Supreme Court Rules states that "[a] petition for a writ of certiorari will be granted only when there are special and important reasons therefor," which include, but are not limited to, the situation "[w]hen . . . a United States court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court." This is precisely what is in issue in the instant case.

Under the dual card doctrine, an employer cannot recognize one of two rival unions based upon cards signed by employees who have signed cards for both unions. Thus, where an employee has signed cards for

two different unions, neither card can be counted toward determining majority status, absent evidence of the employee's subjective intent. *Crest Containers Corp.*, 223 NLRB 739, 741 (1976). This doctrine applies even where the employer has no knowledge of the fact that employees had signed cards for more than one union or even that there was a rival union campaign. *Id.* at 741.

Accordingly, in the instant case, as a result of its application of the dual card doctrine, the Board held that Petitioner acted unlawfully in recognizing District 6 as the collective bargaining representative of its employees even though Petitioner had no knowledge of the existence of the dual cards or that another union was also organizing its employees.

In *International Ladies' Garment Workers' Union v. NLRB, (Bernhard-Altmann Texas Corp.)*, 366 U.S. 731 (1961) this Court held that employer scienter was not a prerequisite to finding a Section 8(a)(2) violation. However, the Court stated in pertinent part:

> If an employer takes reasonable steps to verify union claims, themselves advanced only after careful estimate – precisely what Bernhard-Altmann and petitioner failed to do here – he can readily ascertain their validity and obviate a Board election. We fail to see any onerous burden involved in requiring responsible negotiators to be careful by cross-checking, for example, well analyzed employer records with union listings or authorization cards . . . Moreover, no penalty is attached to the violation. Assuming that an employer in good faith accepts or rejects a union claim of majority status, the validity of his decision may be tested

> in an unfair labor practice proceeding. If he is found to have erred in extending or withholding recognition, he is subject only to a remedial order requiring him to conform his conduct to the norms set out in the Act, as was the case here. No further penalty results.

366 U.S. at 739-740.

In the instant case, HDA took the necessary steps called for in *Bernhard-Altmann* to verify District 6's claims by cross-checking its payroll records with the Union's authorization cards.[2] However, a penalty *does* attach to the employer in this case. The employer is now required to reimburse thousands of employees for union dues deducted over a ten-year period of time. This money was turned over to District 6, which, in turn, provided the benefits of a collective bargaining agreement and union representation to Petitioner's employees. District 6 is not required to reimburse the employees since, due to a clerical error, the Board failed to timely serve District 6 with an unfair labor practice charge. *To require Petitioner to make reimbursement clearly constitutes a penalty.* Moreover, during this ten year period since the recognition, the parties have negotiated four collective bargaining agreements. At the conclusion of any of the four contracts, the employees, as well as any other union, could have petitioned the NLRB to challenge District 6's majority status. Additionally, during the life of any of the contracts, the

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[2] In fact, in the instant case, Petitioner initially rejected Intervenor's request for recognition because of an insufficient number of cards. Petitioner granted recognition only after a *second* card count.

employees could have filed a deauthorization petition in both instances, eliminating any obligation to pay dues. Since no representation or deauthorization petition was filed, it now becomes punitive to order the Employer to repay dues. The Second Circuit, contrary to the D.C. Circuit, has refused to grant what it considered to be punitive damages in a Board Order. See *Manhattan Eye, Ear and Throat Hospital v. NLRB*, 942 F.2d 151 (2d Cir. 1991). Lastly, the Act itself limits the Board to a "make whole remedy". The remedy in this case, under the circumstances described above, results in those employees who received the benefits of the contract for ten years without taking any action to eliminate their obligation to pay to become unjustly enriched.

The continued application of the dual card doctrine presents the employer faced with union organizing with a Hobson's choice. As a result of the dual card doctrine, an employer can never grant voluntary recognition to a union without risking an unfair labor practice since knowledge of the dual cards or even of the rival union organizing campaign is not required. Since there may always be an unknown rival union organizing, an employer can never safely grant voluntary recognition.

Clearly, such a result is contrary to the express policy and purpose of the Act to avoid industrial strife and promote the full flow of commerce. It is *not* the policy of the Board to discourage voluntary recognitions. In fact, pursuant to Section 8(b)(7)(C) of the Act, a labor organization may picket for recognition for up to thirty days before it must file a petition. It is clear that, where a request for recognition by a union is denied, a union may

engage in such picketing to force recognition. Thus, an employer presented with a request for voluntary recognition may be faced with the difficult choice of granting the request and risking an unfair labor practice, or facing thirty (30) days or more of picketing. Encouragement of such activity by discouraging voluntary recognition is thus contrary to the express policies and purposes of the Act set forth in Section 1 thereof.

Furthermore, employers frequently obtain economic concessions from a union when they grant voluntary recognition without forcing the union to go to the Board for an election. Employers who do demand Board certification frequently face increased demands from the union who have had to make promises to employees in order to win the election. This leads to increased antagonism in the course of negotiations and increases the possibility of labor strife, contrary to the purposes of the Act.[3]

As noted by Judge Edwards in his dissent, the Board's decisions in this area have been confusing, inconsistent and incoherent.

Originally, in *Midwest Piping and Supply Co.*, 63 NLRB 1060 (1945), the Board held that an employer, by recognizing one union while a petition filed by a rival union was pending, violates Section 8(a)(1) and (2) of the Act. In subsequent cases, the Board expanded upon this doctrine

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[3] In the instant case, picketing for recognition or any labor strife would have worked a particular hardship upon Petitioner, a not-for-profit corporation, which provides home health care attendants for the homebound infirm.

to mandate strict neutrality whenever there was a "real question concerning representation" even though no petition had been filed. *Playskool, Inc.*, 195 NLRB 560 (1972), *enf. denied*, 477 F.2d 66 (7th Cir. 1973). However, this doctrine was applied inconsistently by the Board with widely disparate results. *American Can Co.*, 218 NLRB 102 (1975), *enforced*, 535 F.2d 180 (2d Cir. 1976); *Robert Hall*, 207 NLRB 692 (1973); *American Bread Co.*, 170 NLRB 85 (1968), *enf. denied*, 411 F.2d 147 (6th Cir. 1969).

Several circuit courts refused to enforce the modified *Midwest Piping* rule. *See Wintex Knitting Mills v. NLRB*, 610 F.2d 430 (6th Cir. 1979); *Buck Knives v. NLRB*, 549 F.2d 1319 (9th Cir. 1977); *NLRB v. Inter-Island Resorts*, 507 F.2d 411 (9th Cir. 1974); *NLRB v. Suburban Transit Corp.*, 499 F.2d 78 (3d Cir. 1974); *Playskool, Inc., supra; American Bread Co. v. NLRB, supra; NLRB v. Air Master Corp.*, 339 F.2d 553 (3d Cir. 1964). These courts perceived a conflict between the Act's fundamental purpose of promoting industrial stability and harmony, and the application of *Midwest Piping*.

This "great weight of authority in the Courts of Appeal" did not go unnoticed by the Board. In 1982, the Board limited the *Midwest Piping* doctrine by its decision in *Bruckner Nursing Home*, 262 NLRB 955 (1982).

In *Bruckner*, the Board held that in an initial organizing campaign, where rival unions are present and no petition has yet been filed, an employer is free to grant recognition to a labor organization which represents an uncoerced majority of employees.

It appeared that the Board in *Bruckner* sought to eliminate the need for employers to automatically reject a

demand for voluntary recognition based upon an objective card majority and, instead, demand an election. It appeared that an employer could now voluntarily recognize a union based upon a card majority, provided no other union had filed a petition.

Based on the Board's decision in *Bruckner*, it was logical to conclude that the dual card doctrine was no longer viable since the continued application of that doctrine would render voluntary recognition too perilous a course of action to take in rival union organizing scenarios. Obviously, as the Board noted in *Midwest Piping*, whenever there are rival unions organizing, there is a strong likelihood that some employees will sign cards for both unions. If employers are faced with unfair labor practice exposure for recognizing a union after neutral verification of a card majority because some of the card signers had signed cards for other unions, they would never feel free to voluntarily recognize one union where two unions were organizing. Since this was the result the Board intended to avoid by adopting the *Bruckner* rule, it appeared that the dual card doctrine was no longer applicable. In fact, the Board in *Bruckner* explicitly concluded that the dual card doctrine no longer had any validity:

> [T]he phenomenon of dual cards in a rival union organization setting can no longer justify our absolute refusal to rely on cards in *Midwest Piping* situations, particularly since we regard them as a reliable means of ascertaining the wishes of a majority of employees in other organizational settings.

262 NLRB at 958.

However, the Board decision in the instant case continued to follow the dual card doctrine as if *Bruckner* had never been decided. In fact, neither the Board nor the Administrative Law Judge ("ALJ") mentioned the *Bruckner* case in their decisions.

In his dissent, Judge Edwards clearly articulates the conflict between the dual card doctrine and *Bruckner*:

> The existence of dual cards provided the prototypical example of a situation in which employers had to guess whether there was a real question concerning representation. Indeed, the employer is put in a ridiculous situation because, usually, there is no way to determine the presence of "dual cards." But under *Bruckner*, "an employer will no longer have to guess." *Id*. The rival union can protect its interests by the simple expediency of filing a petition with the Board, provided it can demonstrate at least 30% support. And, where the rival union "cannot command the support of even 30 percent of the unit, it will no longer be permitted to forestall one employer's recognition of another labor organization which represents an uncoerced majority of employees." *Id*. Because dual cards no longer affect whether the employer may recognize one of two rival unions, the dual-card doctrine is no longer relevant to rival-union, initial-organization situations.

(App. A at 40-41).

The Board added further confusion in this area by its decision in *Rollins Transportation Systems*, 296 NLRB No. 108, 132 L.R.R.M. (BNA) 1185 (1989).

In its decision, the Board stated:

> *Likewise, this holding should not lead other employers in factually similar situations, to be reluctant for fear of violating the Act, to grant recognition to unions that have demonstrated majority support.* Indeed, we agree with our dissenting colleague that the grant of recognition here would be lawful under *Bruckner* because the Intervenor was recognized before the Employer had knowledge of the Petitioner and its petition. *Knowledge is a critical element in determining the lawfulness of an employer's granting recognition in the rival union, initial organizing unfair labor practice setting.*

Rollins at 132 L.R.R.M. (BNA) 1187-88, n.5 (emphasis added).

Again, from this language it appears that the dual card doctrine is inapplicable to an unfair labor practice charge such as that presented in the instant case where the employer lacked *knowledge* of the rival union's organizing.

However, as the Board decision herein reveals, an employer can be found guilty of an unfair labor practice by voluntarily recognizing one of two rival unions even where it has no *knowledge* of dual cards or of a rival union organizing campaign.

If an employee signs more than one authorization card, he or she should expect that either card may be validly counted to permit either union to achieve a majority – regardless of the employee's change in subjective intent. It is clearly more appropriate to place this burden on the employee, rather than on the unsuspecting

employer who had no knowledge that an employee had signed cards for two unions or even that two unions were organizing. As the Board stated in *Rollins*, knowledge is the key element in determining the lawfulness of an employer's grant of voluntary recognition. Where there is no knowledge, there should be no unfair labor practice.

In fact, the Board has long recognized that there is no reason why employees, if they so choose, may not join more than one labor organization. *Brooklyn Borough Gas Co.*, 110 NLRB 18, 20 (1954). Accordingly, dual cards signed for more than one labor organization will be counted towards a union's requisite thirty percent showing of interest for the filing of an election petition. *Id.*

This case, as Judge Edwards pointed out in his dissent, is one of several Board decisions which have "given conflicting signals as to whether the dual card doctrine survives *Bruckner*" (App. A at 44). Under these circumstances, it is clear that the Board has failed to give sufficient guidance to employers as to the law in rival union organizing situations.

Thus, it is clear that the Board's continued application of the dual card doctrine is irrational and inconsistent with the purposes of the Act and contrary to this Court's decision in *Bernhard-Altmann*. The order is fundamentally unfair to Petitioner, who should not be penalized for events that transpired without its knowledge or control or where the employees on their own or a rival union could have availed themselves of the Board's election process at any time during this ten year period but instead did nothing to exercise their rights.

The current state of the law in this area creates a serious dilemma for the employer who is faced with the choice of voluntarily recognizing a labor organization that has established majority status and risking an unfair labor practice; or, rejecting the demand for recognition and facing possible picketing or labor strife. Clearly, this Court in *Bernhard-Altmann* did not contemplate as a result of its decision, employers would be faced with such a choice. It is thus necessary for this Court to now nullify the dual card doctrine to permit employers to grant voluntary recognition upon a showing of majority status where it has no knowledge of the dual cards or of the rival union's organizing efforts. This will promote the Act's purpose of promoting industrial stability and harmony and avoid the necessity of Board-ordered elections in every union organizing campaign. This rule would provide certainty to labor organizations and employers who wish to enter into an agreement for voluntary recognition and still protect the rights of employees to select their own labor organization.

This area of the law has been a source of uncertainty since the Board's decision in *Midwest Piping* in 1945. It is now time for this Court to put an end to this uncertainty by finally nullifying the dual card doctrine.

CONCLUSION

For all the foregoing reasons, Petitioner respectfully requests that the writ should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 89-1551 **September Term, 1990**

Human Development Association,
Petitioner

v.

National Labor Relations Board,
Respondent

PETITION FOR REVIEW AND CROSS-APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

Before: EDWARDS, D.H. GINSBURG and SENTELLE, Circuit Judges

JUDGMENT

(Filed July 9, 1991)

These causes came on to be heard on the petition for review and cross-application of an order of the National Labor Relations Board and were argued by counsel. On consideration thereof, it is

ORDERED and **ADJUDGED**, by the Court, that the petition for review is denied and the cross-application for

enforcement is granted, in accordance with the Opinion for the Court filed herein this date.

Per Curiam
FOR THE COURT:

/s/ Constance L. Dupre
CONSTANCE L. DUPRE, CLERK

Date: July 9, 1991
Opinion for the Court filed by Circuit Judge D.H. Ginsburg
Dissenting opinion filed by Circuit Judge Edwards

A true copy:
Test: Constance L. Dupre
United States Court of Appeals
for the District of Columbia Circuit

By: Illegible Deputy Clerk

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued October 18, 1990 Decided July 9, 1991

No. 89-1551

HUMAN DEVELOPMENT ASSOCIATION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

DISTRICT 6, INTERNATIONAL UNION OF INDUSTRIAL, SERVICE, TRANSPORT AND HEALTH EMPLOYEES, INTERVENOR

Petition for Review of Order of the National Labor Relations Board

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Martin Gringer for petitioner.

Jonathan Walters for intervenor.

Scott D. MacDonald, Attorney, National Labor Relations Board, with whom *Aileen A. Armstrong*, Deputy Associate General Counsel, and *Peter Winkler*, Supervisory Attorney, National Labor Relations Board,

were on the brief, for respondent. *Marion L. Griffin* also entered an appearance for respondent.

John Hogrogian and *Michael Adler* were on the brief for *amicus curiae* urging that the petition for review be denied.

Before EDWARDS, D. H. GINSBURG, and SENTELLE, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* D. H. GINSBURG.

Dissenting opinion filed by *Circuit Judge* EDWARDS.

D. H. GINSBURG, *Circuit Judge:* Human Development Association (HDA), a home health care provider, recognized District 6* as the collective bargaining representative of its home attendant employees. The National Labor Relations Board found, however, that District 6 did not have the support of a majority of the home attendants when HDA recognized it, and therefore held that HDA engaged in an unfair labor practice in violation of §§ 8(a)(1) and 8(a)(2) of the National Labor Relations Act, 29 U.S.C. § 158(a)(1)-(2). Those sections forbid an employer respectively (1) to interfere with the exercise of employees' right to organize or refrain from organizing, and (2) to provide financial or other support to a labor

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* International Union of Industrial, Service, Transport and Health Employees (formerly Local 6, International Federation of Health Professionals).

organization. The NLRB also concluded that, by entering into a collective bargaining agreement with District 6 and by enforcing the union security clause of that agreement, HDA violated §§ 8(a)(1), 8(a)(2) and 8(a)(3) of the Act, 29 U.S.C. § 158(a)(1)-(3). The relevant parts of § 8(a)(3) forbid an employer to discriminate in the terms and conditions of employment for the purpose of encouraging membership in a labor organization (apart from a union security clause in an agreement with a legitimate collective bargaining agent).

HDA petitions for review of the Board's order, claiming that the Board erred in finding that District 6 did not have majority support when HDA recognized it. First, HDA argues that the Board can no longer apply its dual card doctrine, under which the Board did not count as District 6 supporters six HDA employees who signed cards both for District 6 and for another union. Second, HDA challenges the Board's decision to reject as evidence of timely support photostatic copies of union cards that were signed after HDA recognized District 6. HDA claims that this decision is not supported by substantial evidence.

Because of a clerical error, the Board did not serve District 6 with an unfair labor practice complaint within the limitations period. District 6 participated in the Board proceedings, however, as "Party to the Contract"; it intervenes here in support of the Employer, and puts forth the additional argument that the Board improperly asserted jurisdiction over HDA.

We hold that the Board's assertion of jurisdiction was proper, and accept its reaffirmation of the dual card doctrine. We do not reach the other arguments presented because, even if successful, they would not be sufficient to sustain the claim that District 6 enjoyed majority support when HDA recognized it. Consequently, we deny the petition for review and grant the Board's cross-petition for enforcement of its order.

I. Background

The New York City Human Resources Administration (City) contracts with HDA to provide home care attendants for Medicaid recipients. The City pays HDA a gross amount per hour of care, and requires that HDA employees be covered by the City's employee health benefit plan. HDA hires and supervises its home attendants without day-to-day interference from the City.

In the first half of 1981, four different unions mounted campaigns to organize the home attendants working for HDA. In April, two unions no longer involved in this case filed and then withdrew a joint petition for a Board-certified representation election. A third union, District 1199, National Union of Hospital and Health Care Employees, conducted a mail campaign, which it supplemented with personal solicitations outside the HDA office and employee meetings at various sites off the premises. The fourth union, District 6, campaigned entirely by mail.

Believing that it had the support of a majority of the home attendants, District 1199 began in late May or early June to telephone the director of HDA in order to initiate

collective bargaining. The director did not return those calls and, when eventually reached, refused to discuss District 1199's demand for collective bargaining. HDA officials instead hastened to meet with District 6, and on June 11 conducted a count of that Union's authorization cards. The count failed to show a District 6 majority, so HDA and District 6 conducted another card count on June 22. On the second try District 6 appeared to have the barest majority, 91 cards in a bargaining unit that, according to a stipulation by the Employer and the Union, consisted of 181 employees. HDA immediately recognized District 6 as the collective bargaining representative of the home attendants, and two days later signed a collective bargaining agreement containing a union security clause.

District 1199 finally demanded recognition by letter on June 29, but HDA officials refused to meet with that union. Although it never petitioned the Board for a representation election, District 1199 did charge HDA and District 6 with unfair labor practices in connection with the events of June 1981. As noted above, District 6 was not timely served with the charge.

After a 15-day hearing, an administrative law judge found that HDA had committed unfair labor practices by recognizing District 6 when that Union did not represent a majority of the home attendants, by entering into a collective bargaining agreement with the minority Union, and by enforcing the union security clause in the agreement. In finding that HDA did not represent a majority of the home attendants as of June 22, the ALJ applied the Board's dual card doctrine, subtracting from the total number of District 6 authorization cards signed by the

recognition date all cards signed by employees who had also signed District 1199 authorization cards. *See, e.g., Crest Containers Corp.*, 223 N.L.R.B. 739, 741-42 (1976); *Harry Stein (Ace Sample Card Co.)*, 46 N.L.R.B. 129, 130-31 (1942). This left District 6 with 94 timely cards out of a bargaining unit that the ALJ determined to number 188. On remand from the Board to reconsider the question of the Board's jurisdiction in light of its intervening decision in *Res-Care, Inc.*, 280 N.L.R.B. 670 (1986), the ALJ found that the assertion of jurisdiction remained proper.

The Board affirmed the ALJ's decision both as to jurisdiction and on the merits. *Human Dev. Ass'n*, 293 N.L.R.B. No. 140 (May 22, 1989). The board also found that photocopies of five authorization cards signed after June 22, 1981 did not demonstrate that the signers supported District 6 on or before that date; those employees thus could not be counted in the number of District 6 supporters as of the time that HDA recognized that Union.

The Board ordered HDA not to recognize District 6 as the representative of the home attendants unless and until that Union won a Board-certified election. The Board also ordered HDA to reimburse with interest all Union dues and initiation fees paid by or withheld from employees as a result of the union security clause, except for payments by employees who signed District 6 authorization cards before the Employer's unlawful recognition forced them to join the Union.

II. Jurisdiction

HDA is unquestionably an "employer" within the statutory jurisdiction of the Board *See* NLRA § 2(2), 29

U.S.C. § 152(2). Based upon the exclusion of "any State or political subdivision thereof" from the definition of an employer, however, the Board may exercise its discretion, with respect to a particular bargaining unit, not to assert jurisdiction over a statutory employer that provides services exclusively to an exempt government entity. *Res-Care, Inc.*, 280 N.L.R.B. 670 (1986); *see also Long Stretch Youth Home, Inc.*, 280 N.L.R.B. 678 (1986). In deciding whether to assert jurisdiction, the Board examines "not only the control over essential terms and conditions of employment retained by the employer, but also the scope and degree of control exercised by the exempt entity over the employer's labor relations, to determine whether the employer in issue is capable of engaging in meaningful collective bargaining." *Res-Care*, 280 N.L.R.B. at 672. The employer bears the burden of persuading the Board not to exercise its statutory jurisdiction. *See International Ass'n of Firefighters*, 292 N.L.R.B. No. 114, at 5 (Feb. 10, 1989).

A reviewing court will not disturb the Board's discretionary decision to assert its jurisdiction "absent a showing that [the Board] acted unfairly and caused substantial prejudice to the affected employer." *NLRB v. Parents & Friends of the Specialized Living Center*, 879 F.2d 1442, 1448 (7th Cir. 1989). The Board nevertheless is "bound by its own rules until it changes them, including the rules that it has adopted in order to channel what would otherwise be an essentially unreviewable discretion in the deployment of its limited prosecutorial resources." *NLRB v. Kemmerer Village, Inc.*, 907 F.2d 661, 663-64 (7th Cir. 1990) (citations omitted). *Cf. Hicks v. NLRB*, 880 F.2d 1396 (D.C. Cir. 1989) (remanding to Board for "action . . . consistent

with its existing precedents or generation of a new jurisdictional rule").

District 6 argues that the Board abused its discretion by asserting jurisdiction over HDA. Specifically, the Union claims that the City so extensively controls the essential terms and conditions of employment with HDA that the Employer cannot engage in meaningful collective bargaining. Thus, argues District 6, under *Res-Care*, the Board should have declined jurisdiction in this case. We savor the irony of the Union's contention that, although it readily negotiated to collect compulsory dues from HDA employees, it cannot engage in meaningful collective bargaining on their behalf. HDA itself takes no position on the jurisdictional issue. (Although HDA does not brief the jurisdictional issue, it expressly raised that issue in the Statement of Issues supporting its petition for review. Thus the rule of *Illinois Bell Telephone Co. v. FCC*, 911 F.2d 776, 786 (D.C. Cir. 1990) ("An intervening party may join issue only on a matter that has been brought before the court by another party"), does not affect our consideration of the issue.)

A. *Res-Care and Long Stretch*

The two leading cases in this area, which were decided on the same day, illustrate the fact-intensive nature of the Board's jurisdictional inquiry. In *Res-Care* the Board declined to assert jurisdiction although the employer was solely responsible for "hiring, firing, demotions, and transfers," and had final authority over grievances. *Id.* at 674. Referring to "a core group of 'basic bargaining subjects,' " the Board held that "if an

employer does not have the final say on the entire package of employee compensation, i.e., wages and fringe benefits, meaningful bargaining is not possible." *Id.*

The employer in *Res-Care* operated a Job Corps center under a cost-plus contract with the United States Department of Labor (DOL). Before awarding the contract, the DOL had to approve the employer's budget proposal line by line. The budget set out job classifications, minimum and maximum salary levels for each grade of job, and a detailed statement of personnel policies and benefits, including compensatory time, overtime, severance pay, holidays, vacation, probationary employment, and sick leave. The DOL also had to approve hiring procedures and selection criteria for bargaining unit employees, as well as individual hiring decisions for senior and supervisory staff.

Once the contract was in force, the DOL had to approve any changes in wages or benefits. If the employer paid a higher wage or provided more benefits than the DOL had approved, the Department could reject the added expenditure and reduce its contract payment to the employer. Under these circumstances, the Board found that the "ultimate authority to determine primary terms and conditions of employment" lay with the DOL and not with the employer.

In *Long Stretch Youth Home, Inc.*, 280 N.L.R.B. 678 (1986), the Board distinguished *Res-Care* and asserted jurisdiction over the employer. First, the Board noted that, although the employer in *Long Stretch* was required to submit salary and benefit proposals to the Maryland Social Services Administration and to provide certain

benefits, the agency did not control the exact levels of wages and benefits. *Id.* at 681. Second, the employer's funding was not cost-plus, as in *Res-Care*, but rather per-resident, and thus was not directly tied to the wage and benefit levels submitted to the agency. *Id.* at 681-82. Although the contract provided "an effective ceiling on [employee compensation] by limiting the . . . employer's total budget," it did not impose "specific limits on employee compensation expenditures." *Id.* at 682 n.14.

B. *Development of the Res-Care Analysis*

In the past several years the Board has narrowed the distance between *Res-Care* and *Long Stretch*, and asserted jurisdiction in the lion's share of the cases. Of the thirty-two cases to which it has applied the *Res-Care* analysis, the Board has declined jurisdiction in only six, including *Res-Care*. *See* Appendix following this opinion. Rather than applying any single-factor test, the Board determines whether, in the circumstances of each case, an exempt entity controls the economic terms and conditions of the labor relationship so as to preclude meaningful collective bargaining. *Trailways Commuter Transit, Inc.*, 284 N.L.R.B. 935, 935 (1987). Accordingly, the Board assesses whether the employer or the exempt entity has the "final say over the wages and fringe benefits" of its employees. *International Ass'n of Firefighters*, 292 N.L.R.B. No. 114, slip op. at 5. *See Res-Care*, 280 N.L.R.B. at 674.

For the Board to exercise its jurisdiction, the employer must retain some control over wages and benefits, rather than merely administer a compensation package prescribed by its government contract. The Board

distinguishes between contracts that base funding upon a specific wage schedule, *e.g., PHP Healthcare Corp.*, 285 N.L.R.B. 182, 183-84 (1987), and contracts that merely set an "effective ceiling" on the compensation an employer may offer its employees. *Long Stretch*, 280 N.L.R.B. at 682 n.14. *See, e.g., Community Transit Servs., Inc.*, 290 N.L.R.B. 1167 (1988). In each of the six cases in which the Board has declined jurisdiction, the employer's contract with the government agency set out exact levels for wages and fringe benefits, which the employer could not alter without the approval of the agency. *Career Sys. Dev. Corp.*, 301 N.L.R.B. No. 60 (Jan. 30, 1991) (contract essentially same as in *Res-Care*) (explained in *Career Sys. Dev. Corp.*, 301 N.L.R.B. No. 59, slip op. at 1 n.1 (Jan. 30, 1991); *Southwest Ambulance of Cal., Inc.*, 295 N.L.R.B. No. 21, slip op. at 2-3, 6 n.8 (June 15, 1989); *Thums Long Beach Co.*, 295 N.L.R.B. No. 18, slip op. at 6, 11-12 (June 15, 1989); *Correctional Medical Sys., Inc.*, 289 N.L.R.B. 810, 811-13 (1988); *PHP*, 285 N.L.R.B. at 183-84; *Res-Care*, 280 N.L.R.B. at 673, 674 n.22. *Cf. also Hicks v. NLRB*, 880 F.2d 1396, 1398 (D.C. Cir. 1989), *remanding Florence J. Hicks*, 290 N.L.R.B. 751 (1988), *on remand*, 302 N.L.R.B. No. 116 (Apr. 30, 1991) (reasserting jurisdiction).

The Board has previously asserted jurisdiction over other employers subject to contracts with labor cost provisions similar to those in HDA's contract with the City. In *Parents & Friends of the Specialized Living Center*, 286 N.L.R.B. 511 (1987), *enforced*, 879 F.2d 1442 (7th Cir. 1989), the state prescribed an hourly mean wage rate for a residential facility but provided funding per diem. 879 F.2d at 1445-46. The allocation of wages and benefits to specific individuals was within the employer's control, as

were wage ranges, sick leave, vacation, and holiday pay. *Id.* at 1451. The employer did not need prior approval to make most wage changes, nor to add benefits within the funding level. Hiring, firing, discipline, and other personnel decisions were also largely within the employer's discretion. *Id.* In these circumstances, both the Board and the court of appeals found that meaningful bargaining was possible.

The employer in another case furnished bus drivers to a public transportation authority. *Community Transit*, 290 N.L.R.B. 1167. The contract provided for (1) a fixed fee for supervisory and maintenance operating costs, (2) a fixed management fee, and (3) a variable cost fee for "Vehicle Operator Revenue Labor." *Id.* at 1168. This last sum provided for payment to the employer of $7.685 per vehicle service hour; that amount encompassed wages, fringe benefits, and "indirect labor costs." *Id.* It was "unclear . . . whether [the employer could] transfer funds allotted to one purpose to cover expenses incurred in another area." *Id.*

The Board found that the employer could bargain meaningfully within the effective limitation on wages imposed by the reimbursement rate. Apparently softening the declared requirement of control over "the entire package of employee compensation," *Res-Care*, 280 N.L.R.B. at 674, the Board held that it need not find that the employer controls "each of the economic aspects" of the labor relationship, but only that the employer "exercise[s] control over economic terms and conditions of employment, rather than control over solely noneconomic terms." *Community Transit*, 290 N.L.R.B. at 1170 n.5. In the Board's view, the employer's lesser authority over the

economic terms and conditions of employment was offset by its extensive control over non-economic terms, such as work rules. *Id.* at 1169-70.

In a third case, the Seventh Circuit affirmed the Board's assertion of jurisdiction over an employer that was compensated per diem for each child sheltered in its foster home, with contractual limits on fringe benefits and other items. *NLRB v. Kemmerer Village, Inc.*, 907 F.2d 661 (7th Cir. 1990), *enforcing* 296 N.L.R.B. No. 56 (Aug. 31, 1989). Judge Posner, writing for the court, pinpointed the rather exaggerated dilemma claimed by an employer in HDA's position:

> Kemmerer does not have a free hand in setting employee compensation, true; but who does? . . . In a competitive market competition limits the wages that firms are willing to pay. In a regulated market, the regulatory agency tries to simulate the effects of competition[.] . . . [T]he state does not fix the wages that Kemmerer pays, and so far as appears there is as much play in the joints as in other regulated markets.

Id. at 664.

From our review of these and the other cases listed in the Appendix, we see that the jurisdictional issue before us turns upon whether HDA's contract with the City allows the Employer sufficient autonomy and flexibility to support the Board's assertion of jurisdiction. We turn now to that question.

C. *HDA's Ability to Engage in Meaningful Collective Bargaining*

District 6 argues that the City has the "final say" over HDA's wage levels. The contract clearly provides for payment of a flat sum per hour of service provided, with a higher rate of reimbursement for attendant hours spent caring for two or more recipients. The contract also provides minimum pay scales for attendants caring for one or more than one recipient, the lower minimum being the federal minimum wage as of the contract date.

Board precedent makes clear that an effective ceiling imposed by a public funding scheme does not deprive an employer of the ability to bargain if the employer can set wages at different levels beneath that ceiling. Indeed, District 6 negotiated a 30 cent per hour raise for senior attendants, and imposed a seniority differential about which the contract with the City is silent. Because home attendant salaries are so near the minimum wage, HDA does not have the potential wage range enjoyed by the employer in some other cases, *e.g.*, *Community Interactions – Bucks County, Inc.*, 288 N.L.R.B. 1029, 1032 (1988). It would be an arrogation of the Board's policy-making responsibility, however, for the court to require the NLRB to withhold the protection of the Act from low-paid employees on the ground that there is too little spread between the federal minimum wage and the highest wage they could potentially negotiate in a collective bargaining agreement.

As evidence that the City specifically mandates the HDA wage scale, District 6 offers a 1983 memorandum in

which the City informed HDA that the rate of compensation per hour of service provided would be raised seven percent in the coming year. In fact, however, HDA's significant discretion appears plainly from the very same memorandum, which illustrates several sample compensation schemes allocating the seven percent funding increase in different ways.

This informational memorandum does not ordain any particular allocation of the increase in funding, nor does the contract give the City the right to veto a collective bargaining agreement that HDA negotiates. The City distributed the memorandum in order to provide accounting advice to its contractors and to alert those who might otherwise commit themselves to compensation levels for which they would not be fully reimbursed.

When it examines a proposed agreement, the City's role is similarly advisory rather than coercive. HDA can sign any agreement that it wants to sign, but risks bargaining away more compensation than it will be able to pay out of City funds. *See Dynaelectron Corp., Aerospace Operations Div.*, 286 N.L.R.B. 302, 304 (1987). The flexibility available to HDA within the limits of its contract with the City also appears from the different pay scales it negotiated with District 6 to reflect various distinctions, such as relative seniority, among the home attendants.

District 6 also insists that the City's provision of health insurance for home attendants makes meaningful collective bargaining impossible. As the Board stated in *Community Transit*, however, an employer need not control all of the economic terms and conditions of employment as long as it controls at least some of them. 290

N.L.R.B. at 1170 n.5. Health insurance is hardly a universal or an indispensable element of the employer-employee relationship; its availability for negotiation is not the sine qua non of meaningful bargaining. HDA has full discretion to provide benefits between the statutorily mandated floor (social security, unemployment insurance, worker's compensation, and disability insurance) and the cap in its contract with the City, which limits only aggregate employee benefits (to 18% of aggregate employee salaries). Thus, for example, a union might bargain for supplemental health insurance or for compensatory time off, as it prefers. This affords substantial "play in the joints." *Kemmerer Village*, 907 F.2d at 664.

District 6 argues that the City's control of HDA is pervasive outside the realm of wages and benefits, but the Union points only to trivial or irrelevant phenomena. The Board has understandably excluded from its *Res-Care* analysis minutiae such as the City's mandating the time sheets to be used, along with other types of operational controls that do not significantly affect labor relations within the bargaining unit. *Community Interactions*, 288 N.L.R.B. at 1032 n.12; *Long Stretch*, 280 N.L.R.B. at 682 n.15; *Res-Care*, 280 N.L.R.B. at 674 n.22. The City reviews the selection of the top administrative officers of HDA, in order to ensure compliance with minimum qualification levels, and the contract apportions administrative staff according to the number of clients served. These limitations upon personnel outside the bargaining unit bear too remote a relation to HDA's control over the home attendants inside the bargaining unit, however, to be relevant to the *Res-Care* analysis.

Of course, as District 6 argues, the number of clients funded determines – as a practical, not as contractual matter – the number of attendants HDA can hire, but this point is patently tautological. No labor contractor can practically employ people for whom there is no work. That is irrelevant to the terms and conditions of employment of those whom it does hire.

HDA controls all other areas of the labor relationship, to the virtual exclusion of the city. Hiring, firing, and discipline are entirely HDA functions. HDA sets its own policies for sick leave, holiday pay eligibility, vacation, benefit (compassionate) leave, and other subjects. It sets its own seniority policy and the probationary period for its employees, and has complete control over work rules. The City does set bare-bones minimum qualifications for attendants, *cf. Trailways Commuter Transit*, 284 N.L.R.B. at 937 (1987) (setting minimum qualifications not significant), and it also reviews unresolved client grievances, presumably in order to prevent abusive treatment.

The Board has never declined jurisdiction under *Res-Care* where the government contract did not spell out specific wage and benefit levels. The Board has always asserted jurisdiction over employers having contracts that provided for some form of gross payment to cover labor costs per hour or day of service provided. The exact location of the jurisdictional line drawn by the Board seems to have moved closer to *Res-Care* and farther from *Long Stretch* since those cases were decided five years ago. That line is the Board's to draw, however, so long as it is not drawn arbitrarily. In this case, the Board had and gave good reasons for putting HDA on the *Long Stretch* side of the line. We affirm its exercise of jurisdiction.

III. The Dual Card Doctrine

HDA and District 6 argue that the Board improperly subtracted from District 6's apparent majority those authorization cards that were signed by employees who also signed cards for District 1199. The Employer and the Union insist that an apparent majority is enough in light of *Bruckner Nursing Home, Inc.*, 262 N.L.R.B. 955 (1982). They claim that the Board cannot now hold that an employer commits an unfair labor practice by recognizing and bargaining with a union just because the union did not actually have the unambiguous support of a majority of the employees in the appropriate bargaining unit.

A. *The Vitality of the Dual Card Doctrine*

Under the NLRA, an employer may recognize a union as an exclusive collective bargaining agent only if that union enjoys the support of a majority of the employees in the relevant bargaining unit. *International Ladies' Garment Workers' Union v. NLRB (Bernhard-Altmann Texas Corp.)*, 366 U.S. 731, 737 (1961). By recognizing and bargaining with a minority union, an employer provides forbidden aid to that union and interferes with the employees' right to select their own bargaining representative; the employer thus violates §§ 8(a)(1) and 8(a)(2) of the NLRA. *Id.* at 737-38. The employer's knowledge or ignorance of the union's minority status is irrelevant to the question whether the recognition constitutes an unfair labor practice. *Id.* at 739.

Although an employer may permissibly use a variety of methods to determine the sentiments of its employees, the Supreme Court and the Board have long expressed a

preference for the board-conducted representation election. *Linden Lumber Div., Summer & Co., v. NLRB*, 419 U.S. 301, 304 (1974); *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 596, 601 (1969). When an employer recognizes a union without the confirmation of a representation election, it assumes the risk of mistaking the extent of the union's support, and of committing the unfair labor practices associated with recognition of a minority union. *Bernhard-Altmann*, 366 U.S. at 738-39.

An employer that does not want to go through an election may lessen this risk by requiring the union to present signed authorization cards from a majority of the employees in the bargaining unit. *See Gissel Packing*, 395 U.S. at 597. The existence of a valid card majority at the time of recognition depends upon (1) the validity of the authorization cards presented by the union, and (2) the contours of the relevant bargaining unit. Because both of these elements can readily engender disputes, an employer's recognition of one union frequently leads a rival union to file unfair labor practice charges against the employer and the union it recognized.

For nearly fifty years the Board's policy has been that no union may count towards a majority any authorization card that was signed by an employee who also signed a card for another union, *see, e.g., Crest Containers Corp.*, 223 N.L.R.B. 739 (1976); *Harry Stein (Ace Sample Card Co.)*, 46 N.L.R.B. 129, 130-31 (1942), unless other evidence clearly indicates that the employee intended the later [sic] to repudiate the earlier-signed card. *Crest Containers*, 223 N.L.R.B. at 741 & n.5; *Wavecrest Home for Adults*, 217 N.L.R.B. 227 (1975). Nevertheless HDA and District 6 contend that the Board's continued application of the

dual card doctrine is inconsistent with its decision in *Bruckner,* in which the Board clarified the standards governing an employer's right to recognize a majority union despite the presence of a question concerning representation (QCR).

The Board has long forbidden an employer to recognize any union while a "real question concerning . . . representation" is unresolved, mandating strict neutrality on the part of the employer so as to preserve the integrity of the election process. *Midwest Piping & Supply Co.,* 63 N.L.R.B. 1060, 1070 (1945). Originally, the Board would find a QCR triggering strict neutrality only if an election petition had been filed. *See Bruckner,* 262 N.L.R.B. at 956. Indeed, the term "question concerning representation" derives from the finding that the statute requires before the Board conducts a representation election, a finding that can be triggered only by a petition. *See* NLRA § 9(c), 29 U.S.C. § 159(c). The NLRB will find a QCR necessitating an election only upon a particular threshold showing: a union petitioning for an election must show the support of at least 30% of the employees in the relevant bargaining unit; an employer petitioning in the initial organizing setting must show that a union claims majority support. 29 C.F.R. § 101.18 (1990).

Over the years, in applying the requirement of strict neutrality enunciated in *Midwest Piping,* the Board relaxed the petition requirement in favor of an open-ended, if not standardless, inquiry into the existence of a QCR. *See Bruckner,* 262 N.L.R.B. at 956. *Bruckner* presented an extreme but not a unique case. The ALJ had found that the employer committed an unfair labor practice by recognizing a union that had gotten signed authorization

cards from 80 to 90 percent of the employees in a 125-person bargaining unit, simply because, when the employer recognized the majority union, a rival union had collected two signed authorization cards. The rival had not petitioned for an election nor, obviously, could it have filed a valid petition.

In *Bruckner* the Board declared that a QCR could be raised for the purposes of the *Midwest Piping* doctrine only by the filing of a valid election petition. Thus, while the Board disowned the progeny of *Midwest Piping*, it left the original case intact: the pendency of an election petition raises a QCR that, until resolved, precludes the employer from voluntarily recognizing any union. Absent a pending election petition, an employer is not barred from recognizing a union on the basis of cards simply because a rival union is in the picture.**

Before *Bruckner* the Board had clearly distinguished between a challenge, based upon dual cards, to an

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** Our dissenting colleague mistakenly claims that the Board relies upon *dual* cards in "other organizational contexts," dis. op. at 5 [A-42], but can provide no example. He apparently misconstrues what the Board said in *Bruckner:* "The phenomenon of dual cards can no longer solely justify our absolute refusal to rely on cards in *Midwest Piping* situations, particularly since we regard them as a reliable means of ascertaining the wishes of a majority of employees in other organizational contexts." 262 N.L.R.B. at 958. (1) The antecedent of "them" is clearly "cards," not "dual cards." The Board routinely relies upon authorization cards as indicators of employee preferences. (2) What the Board found no longer justified is not the refusal to credit dual cards but "the absolute refusal to rely on cards" to establish a majority if a rival union has even one signed card.

employer-recognized union's majority support, and a challenge to an employer's strict neutrality under *Midwest Piping*. For example, in rejecting an employer's defense to a § 8(a)(2) charge based upon its purported unawareness that the rival union was conducting an organizing campaign, the Board explained:

> Such knowledge, or the want of it, comes into play as a relevant consideration only in a so-called *Midwest Piping* type of situation, where the majority card count of the union is either established or is assumed, and the theory of the alleged violation is that the employer has acted unlawfully within the meaning of Section 8(a)(1) and (2) by extending recognition to one of two competing unions at a time when he was on notice that a question concerning representation existed. But [when] the union granted recognition was a minority union, nothing further must be shown to support a finding of a statutory violation. For majority designation is a *sine qua non* to lawful recognition of an exclusive bargaining agent under the statute.

Crest Containers, 223 N.L.R.B. at 741-42 (applying dual card doctrine to find unfair labor practice). After *Bruckner* the Board uniformly applied the dual card doctrine when faced with a challenge to the majority status of a union that an employer had recognized during an initial organizing campaign involving multiple unions. *Caro Bags, Inc.*, 285 N.L.R.B. 656, 669-70 (1987); *Windsor Place Corp.*, 276 N.L.R.B. 445, 445 n.1 (1985).

In *Flatbush Manor Care Center*, 287 N.L.R.B. 457 (1987), the Board made explicit the rationale behind that

unwavering practice.*** The Board considered and rejected precisely the arguments that HDA and District 6 make here. While it reaffirmed its adherence to *Bruckner*, the Board found a § 8(a)(2) violation based upon the employer's voluntary recognition of a union whose apparent majority was undercut when the dual cards were subtracted. *Id.* at 458. The Board "agree[d] with the [ALJ] that the case turns on the application of the board's dual-card theory," and "agree[d] with the [ALJ's] reasoning" in finding that dual cards could not be counted. *Id.* That reasoning conclusively disposed of the arguments raised in this case:

*** The "conflicting signals" that the dissent so labors to find, dis. op. at 7-9 [A-44 – A-48], do not appear in any Board decision that actually addresses the dual card issue. The cases that the dissent cites as evidence of a supposedly inconsistent approach to the dual card doctrine in the wake of *Bruckner* share one characteristic with that case: none of them presented a claim that dual cards undermined the card majority of a recognized union. *See Rollins Transp. Co.*, 296 N.L.R.B. No. 108 (Sept. 28, 1989) (decided after *Human Dev. Ass'n*) (representation election petition not barred by an employer's recognition of a "majority" union chosen from among several unions conducting simultaneous organizing campaigns; possibility that recognized union's card majority undercut by dual cards one reason for allowing representation election to proceed); *Film Consortium, Inc.*, 268 N.L.R.B. 436, 436 n.4 (1983) (*Midwest Piping* strict neutrality case notes difference between that theory of § 8(a)(2) violation and theory based upon recognition of minority union); *Great Southern Construction*, 266 N.L.R.B. 364, 365 n.5 (1983) (no cards offered into evidence; no party raised dual card theory); *see also Flatbush Manor*, 287 N.L.R.B. at 471 n.69 (noting that Board omitted dual card analysis in *Great Southern* because case litigated solely under *Midwest Piping*).

> Respondents assert that the Board's decision in *Bruckner Nursing Home* . . . requires a finding that inasmuch as [the rival union] did not file a petition, demand recognition, or notify the Employer of its interest in representing the employees, the "imposition of strict employer neutrality" was therefore not triggered, and accordingly, the Employer was free to recognize [the favored union] on a showing that it represented a majority of the employees. . . . I cannot agree that *Bruckern Nursing Home* changes prevailing Board concepts on the issue of dual cards.

Id. at 471.

The *Flatbush Manor* opinion goes on to reiterate *Bruckner's* requirement that a recognized union represent an "uncoerced, unassisted *majority*," *id.* (emphasis in original), and repeats the warning in *Bruckner* that the Board's curtailment of the *Midwest Piping* doctrine did not change the "longstanding principle" that an employer violates § 8(a)(2) when it recognizes a union that "does not actually have majority support." *Id.* (citing *Bruckner*, 262 N.L.R.B. at 957 n.13). "[T]he facts that no petition was filed, no 'rival claim' for representation was made, and no request for recognition demanded . . . are irrelevant to the question of whether [the union] in fact represented a majority of the employees . . . when it was recognized by the Employer." *Id.* The discussion concludes by holding that "*Bruckner* is inapplicable here because [the union recognized by the employer] did not, in fact represent a majority of the employees." *Id.* at 472.

We find the distinction drawn in *Flatbush Manor* to be sufficient for the purpose of our limited substantive

review of the way in which the Board applies its own prior interpretation of the NLRA. The Board's decision in *Bruckner* to cut *Midwest Piping* back to its roots in no way requires the concomitant demise of the dual card doctrine. *Flatbush Manor*, 287 N.L.R.B. at 471; *Bruckner*, 262 N.L.R.B. at 957 n.23. *Midwest Piping* and *Bruckner* address only an employer's ability to recognize a majority union in the face of a possible QCR.

The dual card doctrine, on the other hand, governs the Board's assessment of a union's claim to majority status regardless of whether a rival union can raise a QCR. Indeed, the Board fashioned the dual card doctrine years before it introduced the *Midwest Piping* version of strict neutrality. *See Harry Stein*, 46 N.L.R.B. at 130-31. While, for obvious reasons, a charge of non-neutrality under *Midwest Piping* often appears together with a challenge to the majority status of a recognized union, they are independent violations and the Board treats them as such.

> Under the *Midwest Piping* doctrine, lack of majority status is not a necessary element of proof of the violation, and proof that the recognized union possesses majority support is not a defense to the alleged violation. See, e.g., *Bruckner*. . . . Recognition of a union that does not possess majority status is a separate theory of violation under Sec. 8(a)(2). . . .

Film Consortium, Inc., 268 N.L.R.B. 436, 436 n.4 (1983). *See also, e.g., Caro Bags*, 285 N.L.R.B. 656; *Hartz Mountain Corp.*, 228 N.L.R.B. 492, 492, 526-30 (1977).

Bruckner is not an endorsement of a greater role for the employer in the multiple union context, but is rather

an acknowledgement that in some cases it may be sensible and efficient for the employer to recognize one union although there is a rival union in the picture. *Bruckner* is designed to enable the employer to do the sensible and efficient thing, however, only in the service of the employees' unambiguous choice, and within the limits of the "less reliable" device of authorization cards. *Bruckner*, 262 N.L.R.B. at 958.

Nor does the dual card doctrine "put[] an employer in an absolutely impossible position," as District 6 argues here. If the employer doubts the majority support of a union seeking recognition on the basis of cards, the employer need not recognize the union until it is certified by the Board after an election. *See Bruckner*, 262 N.L.R.B. at 957 n.13. Furthermore, in that circumstance the burden is on the union, not the employer, to petition for an election. *Linden Lumber*, 419 U.S. at 310.

In sum, the Board's continued application of the dual card doctrine is not "irrational or inconsistent with the Act," *NLRB v. Financial Inst. Employees, Local 1182*, 475 U.S. 192, 202 (1986). Accordingly we defer to its judgment in adhering to the doctrine post-*Bruckner*.

B. *Specificity in Application of Settled Policy*

HDA and District 6 argue that, even if *Bruckner* does not preclude the Board from applying the dual card doctrine, we must remand this case to the Board because it did not acknowledge and specifically dispose of the argument in its brief decision. The Board did state, however, that it had considered the decision of the ALJ in light of

the exceptions raised; this "is sufficient under the circumstances here, to satisfy any applicable requirement of specific format for the Board's opinions." *Division 1142, Amalgamated Ass'n of Street Elec. Ry. & Motor Coach Employees v. NLRB*, 294 F.2d 264, 268 (D.C. Cir. 1961); *see also NLRB v. Vista Hill Found.*, 639 F.2d 479, 482-83 (9th Cir. 1980). Indeed, "where the legal issue raised is insubstantial – where, for example, despite the litigant's claim there is no apparent conflict in earlier agency cases." The Board need not even specifically address an exception to the decision of an ALJ. *International Ass'n of Bridge, Structural & Ornamental Iron Workers, Local 111 v. NLRB, 792 F.2d 241, 247-48 (D.C. Cir. 1986) (Scalia, J.); cf. Atlanta Gas Light Co. v. FERC*, 756 F.2d 191, 198 (D.C. Cir. 1985) (Scalia, J.) (no basis for overturning agency action when petitioner's objection raised "non-problem"). In this case, a remand is not compelled merely because the Board did not recite in full only to reject once again, less than eighteen months after rejecting it in *Flatbush Manor*, a threshold objection to a doctrine applied without interruption for nearly fifty years.

Although "the better practice," *see NLRB v. Process Corp.*, 412 F.2d 215, 217 (7th Cir. 1969), might have been to identify and, citing *Flatbush Manor*, to brush off the argument based upon *Bruckner*, the ruling under review leaves no room for doubt that the Board applied its known position on dual cards to the case before it. Hence HDA was not prejudiced by the Board's terseness. *See American President Lines, Ltd. v. NLRB*, 340 F.2d 490, 492 (9th Cir. 1965).

C. *Remedial Discretion*

HDA argues that, in any event, it should not be required to repay the dues it deducted from the wages of employees who were not District 6 members prior to the negotiation of the union security clause. We do not believe that the Board has here abused its "broad discretion in devising remedies to undo the effects of violations of the Act," *Detroit Edison Co. v. NLRB*, 440 U.S. 301, 316 (1979). The reimbursement order here can "fairly be said to effectuate the policies of the Act," *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 216 (1964), namely (1) that employees and not their employer should select their collective bargaining representative, and (2) that an employer should not force its employees to join a union not chosen by the majority of their peers. We shall therefore enforce the Board's order in full.

IV. Conclusion

HDA makes the desperate claim that substantial evidence does not support the Board's decision to exclude five cards from the District 6 total because they were signed after the date of the card count. HDA also challenges the ALJ's inclusion of two employees in the bargaining unit. We need resolve neither the late card nor the bargaining unit issue. Even if both were resolved in the Employer's favor, District 6 would have only 94 cards. Regardless of whether the bargaining unit comprised 190 employees, as the ALJ found, or 188 employees, as HDA and District 6 contend, the Union falls short of demonstrating the support of a majority of the employees.

The Board properly asserted jurisdiction and applied the dual card doctrine. Accordingly, we deny the petition for review, and the order of the National Labor Relations Board is in all respects

Enforced.

APPENDIX

NLRB Decisions Applying *Res-Care, Inc.*, 280 N.L.R.B. 670 (1986)*

A. Jurisdiction Asserted

1. *Florence J. Hicks*, 302 N.L.R.B. No. 116 (Apr. 30, 1991)
2. *Williams Servs., Inc.*, 302 N.L.R.B. No. 81 (Apr. 11, 1991)
3. *Career Sys. Dev. Corp.*, 301 N.L.R.B. No. 59 (Jan. 30, 1991)

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* We omit cases in which the Board rejected an exception based upon *Res-Care* as untimely, including *Kemmerer Village, Inc.*, 296 N.L.R.B. No. 56 (Aug. 31, 1989) (summary judgment), *enforced*, 907 F.2d 661 (7th Cir. 1990), in which the court of appeals reached the merits of the *Res-Care* argument and found that the Board had properly asserted jurisdiction. We also omit *Auto Bus, Inc.*, 293 N.L.R.B. No. 106 (Apr. 26, 1989), in which the Board denied the employer's motion to dismiss on all grounds including one predicated upon *Res-Care*, but addressed only another ground upon which the ALJ had based a partial dismissal, and *Vanguard Tours, Inc.*, 300 N.L.R.B. No. 30 (Sept. 28, 1990), in which the Board asserted jurisdiction but noted that the employer did not file an exception to the ALJ's *Res-Care* ruling.

4. *Stanley E. Stein*, 300 N.L.R.B. No. 68 (Oct. 31, 1990)

5. *Correctional Medical Sys., Inc.*, 299 N.L.R.B. No. 95 (Aug. 31, 1990)

6. *R.W. Harmon & Sons, Inc.*, 297 N.L.R.B. No. 81 (Jan. 29, 1990)

7. *Human Dev. Ass'n*, 293 N.L.R.B. No. 140 (May 22, 1989)

8. *International Ass'n of Firefighters*, 292 N.L.R.B. No. 114 (Feb. 10, 1989), *supp. dec.*, 297 N.L.R.B. No. 146 (Mar. 9, 1990)

9. *Robinson Bus Serv., Inc.*, 292 N.L.R.B. No. 20 (Dec. 29, 1988)

10. *Community Transit Servs., Inc.*, 290 N.L.R.B. 1167 (1988)

11. *Koba Assocs., Inc.*, 289 N.L.R.B. 390 (1988)

12. *Staff Builders Servs., Inc.*, 289 N.L.R.B. 373 (1988), *enforced*, 879 F.2d 1484 (7th Cir. 1989)

13. *Old Dominion Sec., Inc.*, 289 N.L.R.B. 81 (1988)

14. *Community Interactions – Bucks County, Inc.*, 288 N.L.R.B. 1029 (1988)

15. *Wolf Trap Found. for the Performing Arts*, 287 N.L.R.B. 1040, *supp. dec.*, 289 N.L.R.B. 760 (1988)

16. *Animal Humane Soc'y of S. Jersey, Inc.*, 287 N.L.R.B. 50 (1987)

17. *Columbus Area Community Mental Health Center, Inc.*, 286 N.L.R.B. 1340 (1987)

18. *Parents & Friends of the Specialized Living Center,* 286 N.L.R.B. 511 (1987), *enforced,* 879 F.2d 1442 (7th Cir. 1989)
19. *Dynaelectron Corp., Aerospace Operations Div.,* 286 N.L.R.B. 302 (1987)
20. *Princeton Memorial Hosp.,* 285 N.L.R.B. 1016 (1987), *supp. dec.,* 294 N.L.R.B. No. 47 (May 31, 1989)
21. *Trailways Commuter Transit, Inc.,* 284 N.L.R.B. 935 (1987)
22. *Community Living,* 285 N.L.R.B. 312 (1987)
23. *Dickinson-Iron Community Action Agency,* 283 N.L.R.B. 1029 (1987)
24. *ARA Servs., Inc.,* 283 N.L.R.B. 602 (1987)
25. *Rustman Bus Co., Inc.,* 282 N.L.R.B. 152 (1986)
26. *Long Stretch Youth Home, Inc.,* 280 N.L.R.B. 678 (1986)

B. Jurisdiction Declined

1. *Career Sys. Dev. Corp.,* 301 N.L.R.B. No. 60 (Jan. 30, 1991) (explained in 301 N.L.R.B. No. 59, slip op. at 1 n.1)
2. *Southwest Ambulance of Cal., Inc.,* 295 N.L.R.B. No. 21 (June 15, 1989)
3. *Thums Long Beach Co.,* 295 N.L.R.B. No. 18 (June 15, 1989)
4. *Correctional Medical Sys., Inc.,* 289 N.L.R.B. 810 (1988)
5. *PHP Healthcare Corp.,* 285 N.L.R.B. 182 (1987)
6. *Res-Care, Inc.,* 280 N.L.R.B. 670 (1986)

EDWARDS: *Circuit Judge, dissenting:* In this case, the National Labor Relations Board ("NLRB" or "Board") found the petitioner, Human Development Association ("HDA"), guilty of an unfair labor practice following HDA's voluntary recognition of District 6, International Union of Industrial, Service, Transport and Health Employees ("District 6"), as the exclusive collective bargaining agent for persons employed by HDA in personal home care service. In securing recognition, District 6 had demonstrated majority support by presenting union authorization cards executed by employees in the designated bargaining unit. The Board held, however, that at the time when HDA recognized District 6, the union did not have majority support because several of the employees who had signed authorization cards for District 6 also had signed authorization cards for a rival union.

Although there is no evidence that HDA knew of the existence of these "dual cards," nor is there any evidence that HDA unlawfully favored District 6 over the rival union, the Board apparently adhered to a so-called "dual-card" doctrine in finding that HDA had committed an unfair labor practice in recognizing District 6. The problem with this judgment is that the Board purported to abandon the dual-card doctrine in *Abraham Grossman d/b/a/ Bruckner Nursing Home*, 262 N.L.R.B. 955 (1982) ("*Bruckner*"), thus making it inapplicable here. Accordingly, I would grant the petition for review and remand this case to the Board for further proceedings. At a minimum, this case should be remanded to allow the Board to explain how *Bruckner* and an application of the dual-card doctrine can be harmonized.

Beginning in 1945, the Board adopted the so-called *"Midwest Piping"* doctrine to determine whether an employer had committed an unfair labor practice when recognizing one union in a rival-union, initial-organization context. *See Midwest Piping & Supply Co.*, 63 N.L.R.B. 1060 (1945). In these situations, *Midwest Piping* required the employer to maintain strict neutrality toward the rival unions attempting to organize the employees so long as there existed a "real question concerning . . . representation." *Id.* at 1070. In conjunction with this rule, the Board has employed a *Midwest Piping*-type analysis even in situations where the employer is unaware of the rival union if the recognized union has relied on dual cards to secure bargaining rights. Thus, in such situations, the Board sometimes has refused to count dual cards toward the determination of majority support, because the ambiguity produced by such dual cards sometimes has created a real question concerning representation. What is noteworthy, however, is that even though dual cards sometimes have been found to be fatally ambiguous, they never have been found to be inherently unreliable as a measure of employee sentiment. *See Crest Containers*, 223 N.L.R.B. 739, 741 (1976) (espousing the "dual-card" doctrine).

In 1982, the Board rejected the *Midwest Piping* doctrine in favor of a new test. *See Bruckner*, 262 N.L.R.B. at 957. In *Bruckner*, the Board discarded the "real-question-concerning-representation-test" and instead held that an employer would commit an unfair labor practice only if it recognized a union after a representation petition had been filed with the Board or if it unlawfully coerced employees or assisted the prevailing union. The Board's

decision to depart from *Midwest Piping* has created the confusion which necessitated the instant litigation. On the one hand, not only is the dual-card doctrine inconsistent with the Board's policy enunciated in *Bruckner*, but *Bruckner* expressly repudiated the dual-card doctrine. On the other hand, while some post-*Bruckner* Board cases reflect antipathy toward the dual-card doctrine, there are also some post-*Bruckner* decisions that are consistent with the dual-card doctrine.

In my view, the *Bruckner* decision obviated the need for the dual-card doctrine. The board stated that it would "no longer find 8(a)(2) violations in rival unions initial organizing situations when an employer recognizes a labor organization which represents an uncoerced, unassisted majority, before a valid petition for an election has been filed with the Board." *Bruckner*, 262 N.L.R.B. at 957. The dual-card doctrine is facially inconsistent with this new rule insofar as it holds an employer guilty of an unfair labor practice for recognizing a union even when no rival petition has been filed. The majority may be right in suggesting that the Board's holding in *Bruckner* and its application of the dual card doctrine can be harmonized. But the Board has not done it in this case. The case should therefore be returned to the Board.

I.

If an employer recognizes a union as a sole representative of its employees before the union has gained a majority, the employer's good faith will not constitute a defense. *International Ladies Garment Workers' Union v. NLRB*, 366 U.S. 731 (1961). Thus, if a "dual card" *never*

may be used to establish a union's majority status, then an employer will commit an unfair labor practice if it recognizes a union whose purported majority rests in part on dual cards, *i.e.*, without regard to whether there is a rival union on the scene. The majority assumes this to be the controlling principle in this case; however, I can find no real support for this position in the Board's case law, and it seems unfathomable in light of the Board's decision in *Bruckner*. The simple truth is that the Board never has said that dual cards cannot be used as a measure of union suport [sic].

The dual-card doctrine was a forerunner of *Midwest Piping*. *See, e.g., Harry Stein & Arthur Calder (Ace Sample Card Co.)*, 46 N.L.R.B. 129, 130-31 (1942). Under the doctrine as first enunciated, the Board vitiated an employer's recognition of a union if it could not determine from the record that the employees who signed "duplicate cards" desired exclusive representation by the recognized, rather than a rival, union. Admittedly, the dual-card doctrine is theoretically distinct from *Midwest Piping;* however, the latter has subsumed the former in practice. That is, the dual-card doctrine almost always arises only in connection with a claim that the employer has unlawfully recognized a particular union in a situation in which a rival union is present. And, to the extent that dual cards have been an issue, the Board has never applied a *per se* test; the Board always has looked to see whether the record contains

> evidence . . . of sufficient reliability and probative force to clearly dissipate the ambivalence as to intent that is inherent in dual card designations and to leave no doubt that, at the time

> material to the determination of the issue of majority status, the dual card signer intended only one of his dual cards . . . to evidence his designation of a bargaining agent.

Crest Containers, 223 N.L.R.B. at 741.

In *Crest Containers*, the Board refused to recognize union authorization cards when the signators of those cards also signed cards for a rival union. The dual-card doctrine fit neatly into the *Midwest Piping* framework: where dual cards existed, there might be a real question concerning representation. *Crest Containers*, 223 N.L.R.B. at 741 ("[W]here an employee signs an authorization card for each of two unions, the card of neither union will be regarded as a valid designation that may be counted toward majority, as it is not then possible to determine from the cards which of the two unions the employee has selected as an exclusive bargaining agent.") Thus, in the context of *Midwest Piping's* real-question-concerning-representation test, the dual-card doctrine made perfect sense.[1]

The Board eliminated the real-question-concerning-representation test when it issued *Bruckner*, 262 N.L.R.B. at 957. In *Bruckner*, the Board criticized the *Midwest Piping* test for providing no guidance as to just what constituted a "real question concerning representation." *See id.* The Board realized that the *Midwest Piping* test "frequently

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[1] Although the Administrative Law Judge in *Crest Containers* purports to distinguish the dual-card doctrine from *Midwest Piping*, his decision appears merely to extend *Midwest Piping* to cover situations where the employer is unaware of a rival union.

allowed a minority union possessing a few cards to forestall the recognition of a majority union in an effort to buy time to gather more support for itself or frustrate its rivals." *Id.* at 956. Indeed, before the decision in *Bruckner*, a number of courts already had begun to reject *Midwest Piping*. *See id.* at 957 ("[C]ircuit courts refused to enforce many of our decisions based on "modified" *Midwest Piping* violations. . . . [T]he courts took the view that the question concerning representation was resolved whenever an employer recognized a bona fide majority claimant and had not actually aided . . . the recognized labor organization. At the point an unassisted majority union had been recognized, the courts considered the matter settled, and the question concerning representation resolved." (footnotes omitted). Sensitive to these criticisms, the Board conceded that its goals had "not been accomplished" by *Midwest Piping*, *see Bruckner*, 262 N.L.R.B. at 957, and accordingly rejected *Midwest Piping* in categorical terms:

> [W]e will no longer find 8(a)(2) violations in rival union, initial organizing situations when an employer recognizes a labor organization which represents an uncoerced, unassisted majority, before a valid petition for an election has been filed with the board.

Id. (footnote omitted).

The dual-card doctrine, in the context of *Midwest Piping's* real-question-concerning-representation test, no longer makes sense in the face of *Bruckner's* express repudiation of *Midwest Piping*. Under current Board law, until a rival union files a valid petition with the Board, an employer is free to recognize a labor organization which

represents an *uncoerced, unassisted* majority. *Id.* The central concern of *Midwest Piping, i.e.*, whether a "real question concerning representation" exists, no longer enters into the equation:

> [A]n employer will no longer have to guess whether a real question concerning representation has been raised but will be able to recognize a labor organization unless it has received notice of a properly filed petition.

Id. If a rival union fears defeat, that union is free to file a petition with the board (assuming the rival union can demonstrate the minimum 30% support necessary before a petition may be filed), at which point the employer "must refrain from recognizing any of the rival unions." *Id.*

> Making the filing of a valid petition the operative event for the imposition of strict employer neutrality in rival union, initial organizing situations will establish a clearly defined rule of conduct and encourage both free choice and industrial stability.

Id. To this end, the Board promised to process petitions "in the most expeditious manner possible." *Id.*

The existence of dual cards provided the prototypical example of a situation in which employers had to guess whether there was a real question concerning representation. Indeed, the employer is put in a ridiculous situation because, usually, there is no way to determine the presence of "dual cards." But under *Bruckner*, "an employer will no longer have to guess." *Id.* The rival union can protect its interests by the simple expediency of filing a petition with the Board, provided it can demonstrate at

least 30% support. And, where the rival union "cannot command the support of even 30 percent of the unit, it will no longer be permitted to forestall an employer's recognition of another labor organization, which represents an uncoerced majority of employees." *Id.* Because dual cards no longer affect whether the employer may recognize one of two rival unions, the dual-card doctrine is no longer relevant to rival-union, initial-organization situations.

II.

The analysis does not end here, for *Bruckner* explicitly deals with the dual card problem. Having struck down *Midwest Piping*, the Board was aware that it needed to address the dual-card doctrine as well. The Board concluded that, in the absence of the strict *Midwest Piping* rule, the dual-card doctrine had lost its underpinnings:

> [O]ur new approach provides a satisfactory answer to problems created by execution of dual authorization cards. It is our experience that employees confronted by solicitations from rival unions will frequently sign authorization cards for more than one union. Dual cards reflect the competing organizational campaigns. They may indicate shifting employee sentiments or employee desire to be represented by either of two rival unions. In this situation, authorization cards are less reliable as indications of employee preference. When a petition supported by a 30-percent showing of interest has been filed by one union, the reliability of a rival's expression of a card majority is sufficiently doubtful to

> require resolution of the competing claims through the Board's election process. . . .
>
> . . . . The phenomenon of dual cards in a rival union organizational setting mut be taken into account, but can no longer solely justify our absolute refusal to rely on cards in *Midwest Piping* situations, particularly since we regard them as a reliable means of ascertaining the wishes of a majority of employees in other organizational contexts.

Id. at 958. Clearly, the Board recognized the need to allow employers to rely on dual cards. Although the Board conceded that dual cards may be *less* reliable, the Board refused to go so far as to deem dual cards *un*reliable. In fact, the reliability of those cards becomes sufficiently doubtful to force an election only when a rival union is able to muster the 30% support needed to justify a petition. Just as dual cards are regarded "as a reliable means of ascertaining the wishes of a majority of employees in other organizational contexts," so must they be regarded as a reliable means of ascertaining the wishes of a majority of employees in this organizational setting.

Thus, not only is *Bruckner* facially inconsistent with the dual-card doctrine, but the Board in *Bruckner* expressly disavowed the dual-card doctrine. Footnote 13, upon which the Board's counsel placed primary reliance, does nothing to alter either of these conclusions. Footnote 13 comes at the end of text that says, "we will no longer find 8(a)(2) violations in rival union, initial organizing situations when an employer recognizes a labor organization which represents an *uncoerced, unassisted* majority, before a valid petition for an election has been filed with

the Board," *id.* at 957 (emphasis added); the footnote then reads as follows:

> [W]e emphasize that an employer will still be found liable under Sec. 8(a)(2) for recognizing a labor organization which does not actually have majority employee support. This longstanding principle applies in either a single or rival union organizational context and is unaffected by the revised *Midwest Piping* doctrine announced in this case. For instance, if an occasion arises where an employer is faced with recognition demands by two unions, both of which claim to possess valid authorization card majority support, the employer must beware the risk of violating Sec. 8(a)(2) by recognizing either union even though no petition has been filed. In such a situation, there is a possibility that the claimed majority support could in fact be nonexistent.

Id. at 957 n.13 (citation omitted). This footnote does not revive the dual-card doctrine. The most obvious "possibility" that a claimed majority does not exist will arise in cases where there has been unlawful "coercion" or "assistance." But the presence of dual cards does not, without more, demonstrate unlawful coercion or assistance.

Standing on its own, footnote 13 might be read, as Board counsel reads it, to be consistent with the dual-card doctrine. But such a reading would force us to disregard the Board's more explicit pronouncements that dual cards are only "less reliable" and raise a significant question only when a rival union has demonstrated the minimum 30% support needed to substantiate a representation petition. *See id.* at 958. The Board made its position plain when it stated in the text of *Bruckner* that

> [u]nder our new formulation, the duty of strict employer neutrality and the necessity for a Board-conducted election attach *only* when a properly supported petition has been filed by one or more of the competing labor organizations. Where no petition has been filed, an employer will be free to grant recognition to a labor organization with an uncoerced majority, so long as it does not render assistance of the type which would otherwise violate section 8(a)(2) of the Act.

Id. at 958 (emphasis added). Unless and until the rival union files a representation petition, the employer is free to recognize a union which comes to the employer and demonstrates majority support (even by use of dual cards), so long as that employer does not provide unlawful coercion or assistance. Never having filed a petition, a rival union cannot later claim that the successful union's authorization cards were inadmissible dual cards. The rival union must first muster 30% support and file a petition. Only then will the dual cards receive heightened scrutiny.

III.

If *Bruckner* were the last word on the dual-card doctrine, I would conclude that the doctrine no longer applies in *Midwest Piping* situations. However, the Board subsequently has given conflicting signals as to whether the dual-card doctrine survives *Bruckner*.

On the one hand, the Board has suggested that the dual-card doctrine continues to have vitality apart from *Midwest Piping*. One Board panel actually cited *Bruckner's*

footnote 13, albeit without any discussion, as authority for its decision to exclude dual cards. *See Flatbush Manor Care Center*, 287 N.L.R.B. 457, 458 (1987) (affirming the Administrative Law Judge's assertion that he could not "agree that *Bruc[k]ner Nursing Home* changes prevailing Board concepts on the issue of dual cards". Two other panels have tacitly affirmed the dual-card doctrine without so much as mentioning *Bruckner*. *See Caro Bags, Inc.*, 285 N.L.R.B. 656, 669 (1987) (adopting an Administrative Law Judge's finding that *Crest Containers* is the last word on the dual-card doctrine without discussing *Brückner); Windsor Place Corp.*, 276 N.L.R.B. 445, 449 (1985) (same).

On the other hand, the Board also has suggested that it views *Bruckner* as signalling [sic] the demise of the dual-card doctrine. For example, in *Great Southern Construction, Inc.*, the Board relied on *Bruckner* in allowing an employer

> to recognize whichever of the two Unions *it* deemed represented a majority of its unit employees. True, the Board, in *Bruckner*, cautioned that the safe course for an employer faced with rival claims of majority support would be to refuse recognition. However, this was addressed to the employer's risk of violating Section 8(a)(2) by recognizing a union which did not in fact enjoy majority support. . . . [Where] there is no evidence that [the] . . . Union did not have majority status [the] . . . Employer properly recognized the labor organization it perceived represented a majority of its employees.

266 N.L.R.B. 364, 365 (1983) (emphasis added). The Board did not specifically address the dual-card question since

the parties had not raised the issue, *see id.* at 365 n.5, but the Board's position, as in *Bruckner*, seemed to be that the employer *may* recognize the union which demonstrates majority support to the employer, despite the later discovery of dual cards, in the absence of a properly filed election petition. *See also The Film Consortium, Inc.*, 268 N.L.R.B. 436 (1983) (citing *Bruckner* for the proposition that "the filing of a valid petition is 'the operative event for the imposition of strict employer neutrality in rival union, initial organizing situations' ").

The Board's own confusion recently culminated in *Rollins Transportation Systems, Inc.*, 296 N.L.R.B. No. 108, 132 L.R.R.M. 1185 (1989). Although *Rollins* was a representation (not an unfair labor practice) case, the Board offered some views that are pertinent to the issue at hand:

> Nothing in our holding that no recognition bar exists in the conduct of an election should be construed to cast doubt on the legitimacy of the Employer's granting recognition to the Intervener. Likewise, *this holding should not lead employers in other factually similar situations to be reluctant, for fear of violating the Act, to grant recognition to unions that have demonstrated majority support*. Indeed, we agree with our dissenting colleague that the grant of recognition here would be lawful under Bruckner because the intervenor was recognized before the Employer had knowledge of the Petitioner and its petition. Knowledge is a critical element in determining the lawfulness of an employer's granting recognition in the rival union, initial organizing unfair labor practice setting.

Id. 132 L.R.R.M. at 1187-88 n.5 (emphasis added). If knowledge of the rival union is a critical element of an unfair labor practice charge, the Board could not possibly mean to impute knowledge of the dual nature of the authorization cards to an employer who only learned of the dual cards *after* it had recognized the union. Once the union demonstrates majority support to the employer, that employer should be justified in recognizing that union.

The upshot of these cases is simply that the Board has failed to adopt and explain any coherent position on the dual-card doctrine. In such a situation, it is not for this court to establish Board policy. When the Board waivers between two diametrically opposed policies and fails to explain coherently the legal standard it purports to apply, we require the Board to choose the course to which it will adhere in the future. *See, e.g., United Food & Commercial Wkrs. v. NLRB*, 880 F.2d 1422, 1435-36 (D.C. Cir. 1989) (when "the Board has decided to apply a new approach . . . then we ask the Board to explain why it has made the shift and to identify those factors that will control the determination"). In *United Food and Commercial Workers*, we were unable to ascertain the Board's legal standard regarding an employer's duty to bargain with its employees over a relocation decision. *Id.* at 1423, 1436. Without precisely indicating its policy on the matter, the Board reached a conclusion that was consistent with some past decisions, but inconsistent with others. *See id.* at 1437-38. We rejected the Board's approach:

> As disputes arise, such as the current one, that force the Board to chart a course in the more ambiguous or disputed territory of . . . [a legal]

> test, the Board must accept responsibility for clarifying and identifying the standards that are guiding its decisions.

Id. at 1436. The court also held that the proper place for such an explanation was with the Board, not the appellate court:

> We do not mean to intimate that the Board could not rationally find . . . [the different cases] distinguishable. The Board's counsel points to some arguably plausible points of distinction. But we again state that it is not up to us to imagine what distinctions the Board may have been relying on to decide the present case as it did, in apparent tension with its previous decision. . . . The Board's summary disposition of this case reveals no Board attention to the possible inconsistencies, and thus we are left with an apparent conflict.

Id. at 1437-38 (emphasis and citation omitted); *see also Hicks v. NLRB*, 880 F.2d 1396, 1400 (D.C. Cir. 1989) (remand proper "for further action either consistent with [the Board's] existing precedents or for generation of a new jurisdictional rule"); *Pacific N.W. Newspaper Guild, Local 82 v. NLRB*, 877 F.2d 998, 1001, 1003 (D.C. Cir. 1989) (where Board's application of law is "inconsistent and inadequately explained" and the Board "fails to explain coherently its prior precedent" this court will remand for further explanation).

The serious uncertainty created by *Bruckner* and its progeny necessitates reconsideration of the dual-card doctrine by the Board.

IV.

Bruckner appears to abolish the dual-card doctrine in *Midwest Piping*-type cases. The Board's subsequent decisions have obscured that holding to such an extent that it is impossible to discern the Board's precise position regarding dual cards. The majority opinion in this case may be an adequate resolution of the *Bruckner* issue; the problem is that the majority relies on a rationale of its own making, not one offered by the Board. It may be that the majority, by fiat, has now fixed the Board's case law by simply declaring it to be as the majority states it. If the Board acquiesces in this position, then the law will no longer be in disarray. But this approach, while arguably expedient, is flatly at odds with the law of the circuit requiring a remand.

Respectfully, I dissent.

Human Development Association *and* District 1199, National Union of Hospital and Health Care Employees, R.W.D.S.U., AFL-CIO and Local 6, International Federation of Health Professionals, International Longshoremen's Association, AFL-CIO, Party to the Contract. Case 29-CA-9367

May, 22, 1989

DECISION AND ORDER

By Chairman Stephens and Members Johansen and Cracraft

On April 4, 1985, Administrative Law Judge Arthur A. Herman issued the attached decision. Thereafter, on June 30, 1987, the judge issued the attached supplemental decision.[1] The Respondent and Local 6 filed exceptions and supporting briefs, and the General Counsel filed an answering brief. The General Counsel filed cross-exceptions and a supporting brief. The City of New York filed an amicus brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decisions and the record in light of the exceptions and briefs and has

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[1] The supplemental decision was issued pursuant to a July 31, 1986 Board Order remanding this proceeding to the judge for further consideration of the jurisdiction issue raised at the hearing by Local 6 alleging that the City of New York, and entity exempt under Sec. 2(2) of the Act, exercises sufficient control over the Respondent's labor relations so as to prevent the Respondent from engaging in meaningful collective-bargaining with Local 6.

decided to affirm the judge's rulings, findings,[2] and conclusions and to adopt the recommended Order as modified.

The judge found, inter alia, consistent with the Board's Decisions and Orders in *Res-Care, Inc.*, 280 N.L.R.B. 670 (1986), and *Long Stretch Youth Homes*, 280 N.L.R.B. 678 (1986), that the Respondent, Human Development Association (HDA), is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that the Board should assert jurisdiction

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[2] The General Counsel has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The judge's supplemental decision contains an inadvertent error. In the section of the supplemental decision entitled "Supplemental Findings of Fact," par. 11, L. 7, the sentence "This is not to say that HDA sets the employees' wages" is corrected to read " This is not to say that HRA sets the employees' wages."

The General Counsel's motion to strike portions of the Party to the Contract's brief in support of exceptions is denied.

Local 6, International Federation of Health Professionals filed motions to reopen the record and/or remand the case to the judge for further hearing. The General Counsel opposed these motions. We deny Local 6's motions because the additional evidence sought to be adduced, if admitted and credited, would not require a different result. See Sec. 102.48(d) of the Board's Rules and Regulations.

over the Respondent. We agree with the judge's conclusion that the general overall review exercised by the Human Resources Administration (HRA), a municipal agency of the City of New York, over the Respondent does not sufficiently deprive the Respondent of the ultimate control over essential terms and conditions of employment to preclude it from engaging in meaningful collective bargaining. Accordingly, we find that it is proper to assert jurisdiction over the Respondent.[3]

In his original decision and recommended Order in this case, issued prior to the Board's remand on the jurisdictional issue, the judge concluded that the Respondent violated Section 8(a)(2) and (1) of the Act by recognizing Local 6 as the exclusive bargaining representative of its home attendants on June 22, 1981, when Local 6 did not represent a valid majority of these employees. The judge further concluded that by executing and enforcing a collective-bargaining agreement containing a union-

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[3] In adopting the judge's finding that the control exercised by the City of New York in the area of health insurance is not sufficient to interfere with the Respondent's ability to bargain in a meaningful manner with Local 6 regarding all other terms and conditions of employment, we disavow the discussion contained in the "Analysis and Conclusions" section of his decision that no evidence was introduced to show either that the unions or the vendors were dissatisfied with the arrangement, or that some other arrangement would be more cost efficient.

Chairman Stephens agrees that jurisdiction is properly asserted under the standards of *Res-Care* and *Long Stretch*, and he further finds the assertion of jurisdiction consistent with the statutory standard under the rationale expressed in his dissent in *Res-Care* and concurrence in *Long Stretch*.

security clause covering the Respondent's home attendants on June 24, 1981, when Local 6 did not represent a valid majority of the home attendants, the Respondent violated Section 8(a)(3), (2), and (1) of the Act. The judge held that it was unlawful for the Respondent to have recognized Local 6 based on his determination that the appropriate unit consisted of 190 employees and that Local 6 based on his determination that the appropriate unit consisted of 190 employees and that Local 6 had 100 valid authorization cards, 6 of which could not be counted toward majority support because they had been executed by individuals who had also signed District 1199 authorization cards. The judge concluded that Local 6 possessed only 94 valid cards and that, therefore, Local 6 did not represent a majority of the 190 unit employees at the time recognition was extended on June 22, 1981.

The General Counsel asserts that the judge's figures erroneously include five Local 6 cards that were executed after June 22, 1981 recognition.[4] We find merit to the General Counsel's exception and conclude that the five postrecognition cards should not be counted toward Local 6's majority support. Excluding the five postrecognition cards reduces the number of valid authorization cards to 89.

The Respondent and Local 6 except to the judge's finding that there were 190 employees in the appropriate unit at the time of recognition. In particular, the Respondent and Local 6 argue that employees Lumpris and

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[4] These are the cards of Ida Scotland, Marie Louisaiare, Madeline Hill, Felicia Calo, and Eulalie Campbelle.

Williams are "hold-on" employees and should not have been included in the unit. Local 6 also asserts that employee Mathew should have been included in the unit and her Local 6 card counted. Even if merit were found to these exceptions, Local 6 would have had at most 90 valid authorization cards in a unit of 189 employees, an insufficient number to establish majority support. Accordingly, we find it unnecessary to resolve the issues these exceptions raise.[5]

Accordingly, we adopt the judge's findings that the Respondent violated Section 8(a)(2) and (1) by recognizing Local 6 at a time when it did not represent a majority of the unit employees, and Section 8(a)(3), (2), and (1) by executing and enforcing its June 24, 1981 collective-bargaining agreement containing a union-security clause and a dues-deduction authorization clause on behalf of the minority union.

The judge correctly ordered the Respondent to reimburse all present and former unit employees, except those who joined or signed authorization cards for Local 6 prior to the execution of the collective-bargaining agreement for moneys paid by or withheld from them on or after June 24, 1981, for initiation fees, dues, or other obligations of membership in Local 6. However, we modify the

[5] The General Counsel raises several exceptions to the judge's determination about the size of the unit at the time of recognition, which if found to be meritorious, would increase the size of the unit. The General Counsel also argues that nine additional employees signed dual cards thereby further reducing the number of valid authorization cards in Local 6's possession at the time of recognition. We also find it unnecessary to rule on these exceptions.

judge's decision, remedy, and recommended Order to the extent that it provides for reimbursement to the home attendants who are "dual card" signers, i.e., who signed authorization cards for both Local 6 and District 1199 prior to June 24, 1981.[6] Although the Local 6 cards of the dual card signers were not counted for purposes of determining majority support, the employees' signing cards for District 1199 does not vitiate the voluntary nature of their signing Local 6 cards.[7] But consistent with the Board's decision in *Unit Train Coal Sales*, we conclude that reimbursement is appropriate only with regard to employees who have been coerced into membership in Local 6 by virtue of the union-security clause in the unlawful collective-bargaining agreement executed by the Respondent and Local 6.[8]

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[6] See fns. 59 and 61 of the judge's decision.

[7] See *Unit Train Coal Sales*, 234 NLRB 1265 fn. 3 (1978).

[8] The Respondent contends that a dues reimbursement Order is unwarranted because "[a] contract provision for automatic dues check-off, standing alone, does not constitute sufficient coercion under the law to justify such a drastic remedy," citing *Intalco Aluminum Corp. v. NLRB*, 417 F.2d 36, 39-42 (9th Cir. 1969), as support. We reject this contention. The coercion is inferred from the union-security clause in the unlawful agreement and its requirement of union membership as a term and condition of employment, rather than from the existence of a checkoff provision. Furthermore, the Ninth Circuit itself has recognized the appropriateness of the dues reimbursement remedy subsequent to its *Intalco* decision. In *NLRB v. Jan Power, Inc.*, 421 F.2d 1058 at 1064 (9th Cir. 1970), the court, in upholding the dues reimbursement remedy provided by the Board's order, specifically stated that it was reasonable "for the Board to infer that those employees who joined the union after the

(Continued on following page)

In his recommended remedy, the judge provided interest to be computed in the manner provided in *Florida Steel Corp.*, 231 NLRB 651 (1977). We shall modify the judge's recommended remedy to require that interest be computed in the manner provided in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Human Development Association, Brooklyn, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

(Continued from previous page)

execution of the agreement could well have been motivated by the over-riding compulsion of that agreement and its union-security clause [citations omitted]." In *Sheraton-Kauai Corp. v. NLRB*, 429 F.2d 1352, 1357-1358 (9th Cir. 1970), the same court enforced a dues reimbursement remedy when employees joined the union after being informed they were obligated to do so under the union-security agreement entered into unlawfully by the contracting parties. In that decision, the court, at fn. 6, observed that its *Intalco* and *Jan Power* decisions could only be reconciled by restricting *Intalco* to the specific facts of that case. In any event, we do not subscribe to the view expressed by the Ninth Circuit in its *Intalco* decision, and note further that that view is not representative of the views of other circuit courts. See, e.g., *Longshoremen Local 1814 (Jackson Engineering) v. NLRB*, 735 F.2d 1384, 1404-1405 (D.C. Cir. 1984); *NLRB v. Hi-Temp, Inc.*, 503 F.2d 583, 586-587 (7th Cir. 1974); *NLRB v. Raymond Buick*, per curiam, 445 F.2d 644, 645 (2d Cir. 1971).

1. Substitute the following for paragraph 2(b).

"(b) Reimburse all present and former unit employees, except those who joined or signed authorization cards for Local 6 prior to the execution of the collective-bargaining agreement on June 24, 1981, for moneys paid by or withheld from them on or after June 24, 1981, for initiation fees, dues, or other obligations of membership in Local 6, with interest."

2. Substitute the attached notice marked "Appendix B" for that of the administrative law judge.

APPENDIX B

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT contribute support to Local 6 or to any other labor organization of the employees.

WE WILL NOT recognize Local 6 as the representative of any employees for the purpose of dealing concerning grievances, labor disputes, wages, rates of pay, hours of employment, or other conditions of employment, unless and until the labor organization shall have demonstrated its exclusive majority representative status pursuant to a Board-conducted election among the employees.

WE WILL NOT give effect to the collective-bargaining agreement dated June 24, 1981, between us and Local 6, or to any extension, renewal, or modification, provided, that nothing in this Decision and Order shall require us to vary or abandon any wage, hour, seniority, or other substantive feature of relations with employees established in the performance of that agreement.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL withdraw and withhold all recognition from Local 6 as the exclusive bargaining representative of employees for the purpose of dealing concerning grievances, labor disputes, wages, rates of pay, hours of employment, or other conditions of employment, unless and until that labor organization shall have demonstrated its exclusive majority representative status pursuant to a Board-conducted election among the employees, and shall have been certified by the Board.

WE WILL reimburse all present and former unit employees, except those who joined or signed authorization cards for Local 6 prior to the exeuctuion of the collective-bargaining agreement on June 24, 1981, for all moneys paid by or withheld from them on or after June 24, 1981, for initiation fees, dues, or other obligations of membership in Local 6, with interest.

HUMAN DEVELOPMENT ASSOCIATION

Meredith A. Fisher, Esq. for the General Counsel.

Carolyn H. Nenneman, Esq. (Scoppetta & Seiff), for the Respondent.

Sipser, Weinstock, Harper, Dorn, Leibowitz, Esqs., for the Charging Party.

William Perry, President, and *Saul Jakubowitz, Esq.,* for the Party to the Contract.

DECISION

STATEMENT OF THE CASE

ARTHUR A. HERMAN, Administrative Law Judge. This proceeding under Section 10(b) of the National Labor Relations Act, as tried before me pursuant to due notice on November 28, 1983, February 14-17, 21, 22, March 19-23, 26 and May 1,2, and 5, 1984, in Brooklyn, New York, and New York, New York.

District 1199, National Union of Hospital and Health Care Employees, R.W.D.S.U., AFL-CIO (District 1199), filed its initial unfair labor practice charge on December

14, 1981,[1] and an amended charge on January 6, 1982. These charges culminated in the issuance of a complaint and notice of hearing on February 3, 1982.

The complaint alleges that Human Development Association (the Respondent) violated Section 8(a)(1), (2), and (3) of the Act, by recognizing Local 6, International Federation of Health Professionals, International Longshoremen's Association, AFL-CIO (Local 6), at a time when Local 6 did not represent an uncoerced majority of employees in an appropriate unit and, thereafter, by executing and enforcing a collective-bargaining agreement with Local 6 which contains a union-security clause and a dues-checkoff provision. Respondent's duly filed answer denied the commission of any unfair labor practices.

On the entire record, including my observation of the demeanor of the witnesses, and after due consideration of the briefs filed by the General Counsel, Respondent, and Local 6, I make the following

Findings of Fact

I. JURISDICTION

Respondent admits that it is a not-for-profit New York corporation engaged in the business of providing home care attendant services to Medicaid recipients pursuant to a contract between it and the City of New York, Department of Social Studies of the Human Resources Administration. Respondent further admits that during the past year it has derived gross revenues in excess of

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[1] All dates herein refer to the year 1981 unless otherwise indicated.

$500,000 from the City of New York in exchange for providing home attendant services, and that during the same period it purchased goods and materials valued in excess of $5000 from enterprises located in the State of New York which enterprises received goods and materials directly from States other than New York State.

Although respondent meets the Board's monetary standards for assertion of jurisdiction, it does not admit in its answer, the conclusionary allegation, i.e., that it is engaged in commerce within the meaning of Section 2(2),[2] (6), and (7) of the Act. In addition, Local 6, the party to the contract, disputes the Board's jurisdiction in this proceeding, alleging that the City of New York, an employer exempt from the Act, is a joint employer with Respondent and possesses significant control over Respondent's labor relations decisions.

Testimony regarding this issue was elicited from Rabbi Gruenwald, Respondent's director; William Perry, Local 6's president; and, Robert Shick, Director of the Bureau of Home Care Contract Services for the Human

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[2] Sec. 2(2) of the Act reads: The term"employer" includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision there-of, or any person subject to the Railway Labor Act, as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

Resources Administration (HRA) of the City of New York.[3]

Respondent, an independent private corporation, is one of approximately 70 vendor agencies which the City contracts with to provide personal care services to eligible Medicaid clients.[4] The purchase-of-service agreement between HRA and each of these agencies is negotiated on an annual basis for the fiscal period from July to June. The agreement has basic terms and provisions pursuant to which HRA monitors the operations of the vendor agency (Respondent), and it sets a budget within which Respondent is expected to operate. HRA audits Respondent's books twice a year, and it reviews the resumes of the top officials of Respondent.[5] In addition, HRA reviews vendor's leases to make sure that the city's liability is limited, and Respondent seeks HRA's approval before making large purchases of equipment. However, the record evidence does not support Local 6's contention that Respondent should be exempt from the Board's jurisdiction because it has close ties to an exempt entity, the City of New York. The evidence clearly shows that the

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[3] In its brief, Respondent, after hearing the testimony of Shick, now takes the position that New York City is not a co-employer with Respondent.

[4] R. Exh. 26. Eligibility to receive Respondent's services is determined by HRA.

[5] Respondent's administration is vested in a director and deputy director who are selected by the executive director and board of directors of Respondent's parent organization, Opportunity Development Association. The latter is also an independent private, nonprofit organization, not created by the city of New York, nor is it a department of the City.

city's interest in reviewing certain aspects of Respondent's operation is to protect the city by limiting its liability under the purchase-of-service agreement. HRA looks as those items that could possibly affect the cost of the purchase-of-service agreement. But when it comes to negotiating a collective-bargaining agreement, HRA adopts a hands-off policy and leaves the Respondent and other vendor agencies to their own devices in dealing with the labor organization who represents the home attendants. After negotiations between the vendor and the union are completed, and a collective-bargaining agreement executed, then a copy of the agreement is forwarded to HRA. There is no prior review by HRA. HRA will look at the economic terms of the agreement for its impact on the city relating to its reimbursement rate as stated in the purchase-of-service agreement. If those economic terms exceed the reimbursement rate, HRA will notify the vendor that the city will not exceed its commitment and will not reimburse the vendor beyond its commitment. There is nothing in the purchase-of-service agreement between HRA and the vendor that prohibits Respondent from committing itself to a collective-bargaining agreement that exceeds HRA's commitment, but Respondent does so at its own risk.[6] At no time does

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[6] In fact, the city attempts to aid their vendors prior to their entering into negotiations with the unions, by presenting them with facts and figures so as to give the vendors an idea of how much more money will be available to them for the coming year so that the vendors could negotiate intelligently with Unions. See Party to the Contract Exh.27.

HRA get involved in the terms and conditions of employment of home attendants employed by vendors, nor does it negotiate with unions on their behalf. HRA does not discipline those employees, nor does it get involved in disputes between Medicaid clients and home attendants.

In *National Transportation Service,*[7] the Board concluded that it would no longer utilize the so-called "intimate connection" test, but would instead determine whether the employer itself meets the definition of "employer" in Section 2(2) of the Act and, if so, determine whether the employer has sufficient control over the employment conditions of its employees to enable it to bargain with a labor organization as their representative. Once it is determined that the employer can engage in meaningful collective bargaining with representatives of its employees, jurisdiction will be established. And in *ANKH Services,*[8] a case very similar to the instant case, the Board citing *National Transportation Service,* supra, concludes "that the Employer has substantial, if not total, control over the wages, hours, and other terms and conditions of employment of its in-home-service workers, and that the Employer is thus able effectively to engage in meaningful bargaining over these matters with a labor organization representing them. We shall therefore assert jurisdiction over the employer."

Applying the current Board law, therefore,to the facts in the instant case, I conclude that because the Respondent meets the mandatory standards for assertion of

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[7] 240 NLRB 565.

[8] 243 NLRB 478.

jurisdiction, and because the Respondent has control over the wages, hours, and other terms and conditions of employment of its home attendants so that it can bargain effectively with Local 6, Respondent is not a joint employer with the City of New York and the Board should assert its jurisdiction over Respondent, and I find that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

ii. THE LABOR ORGANIZATIONS INVOLVED

The complaint alleges, Respondent admits, and I find that District 1199 and Local 6 are labor organizations within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

Since 1980 Respondent has been engaged in providing home care services to eligible Medicaid clients pursuant to a purchase-of-service agreement between Respondent and HRA. Respondent performs these services by hiring home attendants who are dispatched to the clients' homes. These home attendants are referred to a Tier 1 employees in the purchase-of-service agreement, distinguishing them from Respondent's administrative employees who are combined in a Tier 2 grouping. Two of Respondent's employees in Tier 2, Marlene Paynter

and Mona Wilson, are classified as personnel specialists.[9] When Respondent would obtain an eligible Medicaid client from HRA, either Paynter or Wilson would visit the client with a registered nurse to determine the needs and requirements of the client. If a home attendant was present, they would interview the home attendant, if not, a home attendant that best suited the client's needs would be assigned by them to the client. Paynter and Wilson handled clients' complaints about home attendants, and would attempt to work out the problem; if they were unsuccessful, they had authority to change the home attendant. Personnel specialists take care of the home attendants' timesheets, and they arrange their vacation and sick leave. Home attendants are paid on an hourly basis. They work from 4 to 24 hours a day,[10] and from 2 to 7 days a week.[11] All of these arrangements are handled by personnel specialists.

Rabbi Gruenwald credibly testified that in addition to the regularly employed home attendants who are assigned on a permanent basis to particular clients, respondent also calls on "hold-on" home attendants from time to time. These hold-ons are home attendants who do not wish to work on a permanent basis or there are no openings for them on a permanent basis. They therefore

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[9] Both testified in this proceeding as witnesses for the General Counsel.

[10] A 24-hour home attendant is called a sleep-in.

[11] Some 7-day clients have two home attendants – one for 5 days, and one for 2 days.

work on a substitute basis, filling in when a home attendant is sick, or takes a day off, or goes on vacation. In Rabbi Gruenwald's own words, "A hold-on employee is someone that works for a short period of time and leaves. Or works for a person, one day here, one day there, for a different client. And they would still be hold-ons." In distinguishing between regular home attendants and hold-ons, Rabbi Gruenwald stated, "We do not have regular employees and ten different names. We have regular employees, working full time for the same client, and we have, as I said in the beginning of the hearing, hold-ons, for client 'a' today for client 'b' next week, and/or an hour here, an hour there." Although it is undisputed that the appropriate unit in this proceeding consists of all home attendants employed by Respondent, Respondent did not include hold-ons in the count when it recognized Local 6.[12]

B. *Recognition of Local 6*

Turning now to Respondent's recognition of Local 6, the following sequence of events is uncontroverted. For several months prior to June 1981, Local 6 conducted a mail campaign attempting to get Respondent's home attendants to sign authorization cards designating Local 6 to represent them. On June 11, a card count was held on Respondent's premises. Those present included Steve Jarema, a business agent for Local 6, Rabbi Gruenwald, and

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[12] The unit status of the hold-ons will be discussed infra.

Dr. Arnold Wolf, Respondent's director,[13] and their attorney Lichstschein. Bornstein, an attorney, conducted the card count by checking Local 6's cards against Respondent's personnel and payroll records. After the count, Bornstein concluded that Local 6 did not have enough cards to constitute a majority, and so Jarema gathered up the cards and left.

On June 22, a second card count took place on Respondent's premises. Perry and Jarema represented Local 6, Rabbi Gruenwald, Dr. Wolf, and Lichtschein represented Respondent, and Samuel Krieger, Esq. conducted the card count. Krieger credibly testified as to who was present and how he went about checking the cards, offered by Local 6, against timesheets and other documents, offered by Respondent. He stated that the parties stipulated that there were 181 employees in the unit, and that when Perry presented him with 91 acceptable cards,[14] he announced that Local 6 represented a majority of the home attendants in the unit.[15] On that

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[13] Dr. Wolf left Respondent's employ in July 1982, and Rabbi Gruenwald replaced him as Respondent's director.

[14] Some of the cards offered by Perry were duplicates and therefore not counted.

[15] According to Joan Kaltschmidt, a secretary employed by Local 6 and the one who accumulated and counted the authorization cards as they came in the mail, Local 6 received over 147 cards. She concedes that some were duplicates, and in that event, she stapled them together with the latest date on top. In any event the General Counsel introduced into evidence Local 6's cards as G.C. Exh. 15 and stipulated that they numbered 134.

same day Krieger reduced his findings to writing by a letter to all concerned parties, verifying his count, and adding the fact that Local 6 "had in its possession 46 additional signature cards which were not submitted for verification." (Party to the Contract Exh.40.) Based on Krieger's findings, Respondent recognized Local 6 as the collective-bargaining representative of its home attendants, and 2 days later, June 24, executed a collective-bargaining agreement with Local 6, containing a union-security clause and a dues-deduction authorization clause, covering the terms and conditions of employment of its home attendants.

Counsel for the General Counsel presented evidence through Herbert Binger, a vice president and area director for District 1199, relating to the latter's organizing efforts concerning Respondent's home attendants. She elicited testimony to the effect that commencing in or about March 1981, District 1199 mounted a mail campaign seeking to get Respondent's home attendants to sign authorization cards; that in late May or early June to August, District 1199 began a personal solicitation outside Respondent's premises; that District 1199 held two meetings with Respondent's home attendants in February-March and April, at which cards were distributed to the home attendants; that despite its campaign efforts, District 1199, the Charging Party, never filed an NLRB petition to represent Respondent's home attendants; and that after repeated attempts during late May and June to reach Respondent's director, District 1199 on June 29, sent a letter to Respondent requesting recognition.[16] However,

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[16] Binger claims that District 1199 had about 50 authorization cards by June 29.

inasmuch as recognition had been extended to Local 6 on June 22, and a contract executed on June 24, Respondent ignored District 1199's letter.

And so, the issue was joined with District 1199 filing the unfair labor practice in the instant proceeding, and the complaint issued by the General Counsel alleging a violation of Section 8(a)(2) of the Act, in that Respondent granted recognition to Local 6 at a time when either (1) Local 6 did not have a sufficient number of valid cards to constitute a majority of the home attendants in the unit on June 22, or (2) the existence of dual cards held by District 1199 nullified the Local 6 cards sufficiently to reduce its valid cards to below the necessary majority.

C. *The Size of the Unit as of June 22*

As stated above, the card count on which recognition of Local 6 was based, occurred on June 22. Among the documents used by Krieger to verify the count was the Respondent's latest payroll register prior to June 22, which was dated June 18,[17] and which contained the names of 181 home attendants. However, the June 18 payroll register listed only those home attendants who were employed for the period from May 30 through June 12. And so, a look at prior and later payroll registers and quarterly ledger cards becomes necessary in order to add those home attendants who were hired between June 13 and 22, and delete those home attendants who no longer

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[17] G.C. Exh. 5.

were employed on June 22,[18] if any. In addition, a determination regarding the unit status of hold-ons must be made, if any appear on those payrolls.

Rabbi Gruenwald testified that eight regularly employed home attendants[19]should be included in the unit despite the fact that their names do not appear on the June 18 payroll register. Rabbi Gruenwald contended that he considered a home attendant to be a regular permanent employee who appeared consistently on the payrolls working for the same client and who received at least three consecutive paychecks. The reason for the absence on these employees from the June 18 payroll could be: vacation, sick leave, or the client could be hospitalized. And, according to Rabbi Gruenwald, these eight employees' names do appear consistently on the payroll except for the June 18 payroll. The General Counsel does not dispute the inclusion of these employees,

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[18] Extensive testimony regarding the status of certain home attendants was elicited from Rabbi Gruenwald on behalf of Respondent, and Marlene Paynter on behalf of the General Counsel. My observation of the witnesses as they responded to questions, leads me to place more reliance on the cold record provided by the payroll registers and ledger cards and I shall use them extensively.

[19] Victoria Bodden, Elsie Duperval, Eppie Edelstein, Mary Hopkin, Rosetta Liburd, Violet Maxwell, Patricia Paul, and Juliette Rose. The Rabbi inadvertently referred to Paulina Paul, but the record shows that Paulina Paul appears on the June 18 payroll register as well as on several other payrolls that follow immediately thereafter, whereas Patricia Paul's name appears for the first time on the July 1 payroll register and continues on payrolls thereafter. Because Paulina's status is not in dispute and she is a regular employee. I will substitute Patricia for Paulina and include Patricia Paul in the unit as well.

except for Bodden. Bodden's name does not appear on the payroll registered for May 21, June 18, July 1, 16, or 30, and August 13. The June 4 payroll register shows an accumulated amount covering a period form [sic]April 13 to May 29, which leads me to believe that this check was for vacation pay. And so, I find that Bodden was no longer employed by Respondent on June 22, and is, therefore, excluded from the unit. However, I shall include the other seven by consent of the parties and the unit count now stands at 188. In addition, Rabbi Gruenwald, contrary to the General Counsel, would exclude Andrea Inniss and Hilda Sears from the unit claiming them to be hold-ons. I have checked the records[20] and, although I disagree with Rabbi Gruenwald regarding Sears' hold-on status, I find that Sears ceased to work for Respondent on June 18, and was not an employee on June 22. Therefore, she shall be excluded from the unit. As for Inniss, the records reflect sporadic earnings totaling a gross amount of $80.40 during the second quarter of the year and her name does not appear on either the July 1, 16, or 30 payroll register. Thus, at most she was a hold-on employee on June 22. In deciding to exclude Inniss, I have come to the conclusion to exclude all hold-on employees. In the case of on-call employees, the Board has taken the view that such employees may or may not be considered regular part-time employees, depending on the specific nature of their work. Where they are employed sporadically with no established pattern of

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[20] Payroll registers received in evidence included those for May 21, June 4 and 18, July 1, 16, and 30, and August 13. Also received in evidence was the quarterly ledger card dated March 26, June 29, and September 24.

regular continuing employment, they are excluded from the unit.[21] From the evidence presented I liken the hold-ons to on-call employees, and I find that Respondent's hold-on employees meet that criteria and, therefore, I shall exclude all hold-on employees from the unit.[22] By excluding Sears, Inniss and Mathew from the unit, the count stands at 185 employees in the unit on June 22. Another employee in dispute is Melicia Wright. My review of the records indicates that Wright's name appears on the payroll register for June 18[23], but does not appear thereafter on any payroll register in evidence for 1981. I conclude, therefore that Wright was not employed by Respondent on June 22, and her name shall be excluded from the unit.[24] Thus, the unit count is now 184. Four other new employees, i.e., employees whose names do not appear on the June 18 payroll register, but who are conceded by Respondent to have been employed on June

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[21] *Piggly Wiggly El Dorado Co.*, 154 NLRB 445, 451 (1965).

[22] A case in point is that of Gladys Mathew. Although her name appears on the June 18 and July 1 payroll registers, it is not repeated either before or after those dates, and her earnings show a much lower figure than regular home attendants, suggesting that Mathew was a hold-on for a very brief period of time. I find that she does not share a community of interest with the regular home attendants sufficient to warrant her being part of the unit and therefore she shall be excluded from the unit.

[23] This payroll register covers the period from May 30 to June 12.

[24] It should be noted that Mathew and Wright were card signers for Local 6. Therefore, I shall reduce Local 6's count by two.

22 as regular employees, namely, Joyce Carnegie, Ana Fernandes, Sara Grunzweig, and Maria Reyes, and whom the General Counsel wants included in the unit, shall be included. The unit count now rises to 188, and as far as Respondent is concerned, that concludes the number of eligible unit employees on June 22.

However,the General Counsel contends that there are other employees who should be added to the list, and I now direct my attention to them. Taking them alphabetically from the General Counsel's Appendix A attached to her brief, I make the following findings of fact.[25]

Marcella Aaron worked for Respondent during the first and third quarters of 1981, but not in the crucial second quarter. Her name does not appear on the payroll registers of May 21, June 4 and 18, or July 1 or 16. It appears on the payroll registers for July 30 and August 13, during which time Aaron serviced three clients. Under the circumstances, I do not find her a regular permanent employee, and I shall not include her in the unit.

Lurrine Brown, an employee hired on June 22, is admittedly a hold-on, and for the reasons stated above, she shall not be included in the unit.

According to Paynter, Coral Brownfield worked on June 20 and 21 for Respondent.[26] Except for her name appearing on the payroll of July 1, covering those 2 days,

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[25] Only those employees on the list who have not been previously considered will be discussed.

[26] Those 2 days were Saturday and Sunday.

it does not appear on the payroll registers of May 21, June 4 and 18, July 16 and 30, or August 13. I find, therefore, that Brownfield was hired for one job only for 2 days, with no expectancy of continued employment and in fact, was not recalled for at least 3 months thereafter, if ever. She shall be excluded from the unit.

The records show that Ernestina Lumpris started working for Respondent on June 22. She worked a full week in that pay period, and 2 full weeks in each of the next two pay periods all for the same client. By Rabbi Gruenwald's own standard, this employee meets the criteria of a regular permanent employee, and I shall include her in the unit as of June 22. This brings the total complement of the unit at this point to 189.

Lorraine Menake is admittedly a hold-on employee. She worked a total of 39 hours through the first three quarters of 1981 (all in July), and did not work on June 22. She shall be excluded from the unit.

Christine Nelson, according to Paynter, was a hold-on employee on June 22, having worked for three clients during the payroll period ending June 26. The payroll registers for July 16 and 30 and August 13 show her working full time for just one client. However, because the crucial consideration is her status on June 22, and it is clear that she was a hold-on on that date, I shall exclude her from the unit.

Gloria Ogilvie worked a total of 69 hours through the first three quarters of 1981, 36 of which she worked in pay period ending July 24. She did not work on June 22 nor during that pay period. Her name does not appear on

the payroll registers for May 21, June 4 and 18, or July 1 and 16. At most, Ogilvie was a hold-on, and she shall be excluded from the unit.

The General Counsel concedes that Loncitta Roach was a hold-on employee, having worked only 8 hours as shown on the payroll register for July 16, and only 48 hours in each of the following two payroll registers. She did not work for Respondent on June 22, nor did she work from May to July. She shall be excluded from the unit.

Lucy Sant started working for Respondent on June 22, and appears on the July 1 payroll register as having worked 2 full weeks. The payroll registers for July 16 and 30, however, show Sant working only 1 week in each period, and the August 13 payroll register does not show Sant at all. Under the circumstances, and applying the principles enunciated above, I find that Sant was only a temporary employee who should not be included in the unit.

Cecilia Sobers was a hold-on employee who worked a total of 4 hours some time during the week ending June 19. Her name does not appear on any payroll register either before that date or after. She shall be excluded from the unit.

Chaim Steinberg worked on June 22, a Monday, and 4 hours each day that week, but not during the next week of that payroll period. In the next payroll period shown in the payroll register of July 16, Steinberg again worked only 1 week for a total of 20 hours. The payroll register for July 30 shows Steinberg working 4 hours each day for both weeks. His name does not appear on the August 13

payroll register. I consider Steinberg to be a hold-on employee, and I will exclude him from the unit.

Eileen Stroude's name appears on the July 1 payroll register as having worked 1 full week in that pay period, including June 22, and 2 full weeks on the July 16 payroll register. Her name does not appear either before or after these entries. She shall be excluded from the unit as a hold-on employee.

The record shows that Zhanna Vitlina worked for Respondent 25 hours a week from the week ending July 3 through the week ending August 7. However, there is no record showing Vitlina working on June 22, despite the fact that the record says she was hired on June 8. Because the records show that her earliest working date was June 27,[27] she was not employed on June 22 and, therefore, shall be excluded from the unit.

The General Counsel admits that Zelpha (Maude) Warden, is a hold-on employee, and the records show that she worked sporadically at that. The July 1 payroll register shows Warden working 2 full weeks for one client, then there is a break in employment. Warden did not work again until the payroll period covered by the payroll register for August 13, which shows her working another full 2 weeks but for another client. I find her to be a hold-on employee and she shall be excluded from the unit.

Bernice Williams started working for Respondent some time during the week ending June 19 and worked

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[27] Respondent's workweek begins on Saturday.

continuously for the same client (Caifa) for 6 consecutive weeks to July 24. The payroll registers for July 1, 16, and 30 reflect these facts. The payroll register for August 13 shows Williams working 2 full weeks for another client (Finnegan), and the quarterly ledger card, dated September 24, shows Williams working into September. Inasmuch as Williams was employed by Respondent on June 22, and worked full time consistently thereafter for at least 3 months, I find her to be a regular employee as of June 22, and she shall be included in the unit. This brings the unit count to 190 as of June 22.

Two employees, Bernadette Connell and Marilyn Jerrick whose names appear on the June 18 payroll register and who were included in the count by Krieger, were the subject of conflicting testimony, i.e., the General Counsel contends they are hold-on employees, whereas Respondent classifies them as regular employees. However, both would include them in the unit. I agree for a different reason. The records show that Connell worked for a client (Bongiovanni) for 40 hours during the week ending May 1; that she then went to work for a client (Bloomfield) on a part-time basis, beginning during the week ending May 22 for 22 hours, the week ending June 5 for 22 hours, the week ending June 12 for 22 hours, the week ending June 19 for 11 hours, the week ending July 3 for 16 hours, the week ending July 10 for 8 hours, the week ending July 17 for 16 hours, and the week ending August 7 for 16 hours. Jerrick was equally as consistent an employee.

The record shows the following:

Week Ending	*Client*	*No. of Hours*
5/8	Bongiovanni	40
5/15	Bloomfield	77
5/22	Bongiovanni	40
5/29	Laplaza	60
5/29	Bloomfield	22
6/5	Laplaca	24
6/5	Teitlebaum	12
6/12	Teitlebaum	84
6/19	Gazzetta	60
6/26	Ambrosio	77
7/3	Ambrosio	77
7/10	Ambrosio	77
7/17	Ambrosio	77
7/24	Ambrosio	77
7/31	Solomon	32
8/7	Solomon	32

While neither meets the standard set down by Rabbi Gruenwald, supra, the consistency of their employment, whether for one client or several or the length of hours performed, is scarcely the pattern of a temporary or casual employee. The Board has held that part-time employees are included in a unit whenever they perform work on a regular basis for a sufficient period of time to demonstrate that they have a substantial community of interest with full-time employees. Such part-time employees are considered regular part-time employees,

and I find Connell and Jerrick to fit that description.[28] Because they have already been included in the unit, the count stands at 190.

D. *Local 6's Status*

The first issue in the complaint raises the question of Local 6's majority on June 22, and whether proper recognition was extended to Local 6 by Respondent.

The General Counsel placed into evidence[29] copies of the authorization cards obtained by Local 6. They totaled 138 cards, of which 4 were duplicates, leaving a balance of 134 cards. Perry testified that this represented all the cards that Local 6 obtained from Respondent's home attendants. By comparing the names on the cards with the names of the 190 employees in the unit on June 22, taking into consideration the two employees (Mathew and Wright) who signed Local 6 cards but whom I have excluded from the unit,[30] I find that Local 6 had valid 100 cards, giving it a majority of the 190 employees in the unit. (See App. A attached hereto.)[31] Under the

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[28] *Farmers Insurance Group*, 143 NLRB 240, 244, 245 (1963).

[29] G.C. Exhs. 15(A)-(EH).

[30] Supra, fn. 24. Although Bodden signed a card for Local 6 and I have excluded her from the unit, the count is not affected because she does not appear on the payroll register for June 18 and I have not added her name to the count.

[31] Respondent, while admitting that Mathew should be excluded, contends that there were 101 valid cards. However, on examination, Respondent will note that I have excluded Wright, for reasons given supra.

circumstances, I find that recognition by Respondent of Local 6 on June 22 was granted in good faith on the basis of a previously demonstrated showing of majority.

E. *The Existence of Dual Cards and Their Effect on Local 6's Majority Status*

Having concluded that Local 6 possessed valid authorization cards from a majority of the unit employees on June 22, I am now confronted with the General Counsel's second argument for voiding a portion of these cards. The General Counsel contends that a sufficient number of Local 6 card signers also signed cards for District 1199 prior to recognition, and therefore those dual card signers should not be counted.[32] When an employee signs an authorization card for each of two unions, it is settled Board law that, absent evidence of the signer's intent, neither of the authorizations is valid because it is impossible to determine which union the employee would designate as the exclusive bargaining representative.[33] In support of its contention, the General Counsel attached an Appendix C to its brief, listing 15 home attendants whom it claims signed dual cards.[34]

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[32] See *Hi Temp Inc.*, 203 NLRB 753 (1973); *Intalco Aluminum Corp.*, 169 NLRB 1034 (1968); *Allied Supermarkets*, 169 NLRB 927. Respondent's argument to the contrary and its reliance on *Wavecrest Home for Adults*, 217 NLRB 227, is misplaced. See Board's fn. 2 therein.

[33] *United McGill Corp.*, 235 NLRB 564, 565.

[34] The General Counsel introduced into evidence, through Binger, 72 District 1199 authorization cards allegedly obtained from Respondent's employees. See G.C. Exh. 36. However, a

(Continued on following page)

Mathew's name can be immediately discounted because it is not included in the list of 190 eligible employees. Four other employees, Benjamin, Boucher,[35] Johnson, and Stephen did not testify in this proceeding. The General Counsel relied on the testimony and memory of Paynter, an alleged supervisor, in trying to establish the fact that all four had signed cards and given them to Paynter to hold. Paynter stated that she had received about 20-30 District 1199 cards from employees and kept them in a basket on her desk; that sometime after the June 22 count, Respondent moved its offices from upstairs to downstairs on the same premises, and Paynter threw the District 1199 cards out; that, however, she remembers some of the names on the cards. At this point, from memory, she recited four names including Johnson and Stephen.[36] She then was shown a payroll list of names by the General Counsel, and she rattled off approximately 20 names including Boucher. Of the four names under discussion only, Johnson's card is in the record, and that is dated September 18 a date long after

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review of those cards indicates an assortment of reasons why the only cards relied on by the General Counsel are contained in App. C, and I shall confine my discussion to the App. C list.

[35] Boucher's name appears on the June 18 payroll register under her first name, Jocelyne. I have listed her name correctly on App. A.

[36] Nowhere in her direct testimony did she ever mention the name Benjamin.

the count.[37] I find that Paynter's testimony was unconvincing as was her manner in testifying, and I discredit her with regard to the alleged cards. Therefore, I find that dual cards for Benjamin, Johnson and Stephen did not exist prior to June 22.[38]

Four other employees, Decasseres, Marcel, Michael, and Wilson did testify, Decasseres contends that she remembers signing a card for Local 6 and a card for District 1199 about the same time sometime in MAy.[39] However, the only card in evidence from District 1199 is dated July 24;[40] Decasseres stated that she had signed two cards for District 1199. Marcel also claims to have signed two cards for District 1199 but only one card is in evidence and it is dated August 1.[41] Michael claims to have signed three cards for District 1199 – two in April or May and one in January 1983. However, none are in evidence. Wilson claims to have signed two cards for District 1199, but only one card is in evidence, and it is dated July 18.[42] Having before me only the cold, hard evidence of three cards all dated after June 22, and the testimony of a fourth witness who claims to have signed three cards, none of which appears in the record, I find the testimony

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[37] G.C. Exh. 36 NN.

[38] Although I find Paynter to be a supervisor within the meaning of Sec. 2(11) of the Act, based on the duties she performs as enumerated supra, I do not believe that such a resolution bears any weight in the final analysis of this case.

[39] In fact, the Local 6 card is dated May 7.

[40] G.C. Exh. 26.

[41] G.C. Exh. 28.

[42] G.C. Exh. 24.

of these witnesses contradictory, confusing, and lacking trustworthiness. I, therefore, discredit their testimony as to when they signed cards that are not available to me, and I do not accept the General Counsel's argument that valid dual cards had been signed by these four employees.

The six remaining employees on General Counsel's Appendix C: Cruz, Hyacinth, Lefkowitz, Rankin, Richardson, and Spence all testified in this proceeding.

Juanita Cruz credibly testified that she started to work for Respondent in December 1980, and that she is still working there; that she was handed a District 1199 authorization card by Joan Johnson on Respondent's premises; that her daughter filled the card out; and that she, Juanita Cruz, signed the card on March 27,[43] and mailed it.[44] Cruz also testified that she signed a card for Local 6 on May 8 after her daughter filled it out.[45] Cruz stated that she was not coerced into signing either card. I find that Cruz signed dual cards, both prior to June 22.

Patricia Hyacinth credibly testified that she is presently employed by Respondent and that she signed a card for Local 6 on May 17,[46] and one for District 1199 on June 19;[47] that she put each card in an envelope on the day she

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[43] G.C. Exh. 11.

[44] Both District 1199 and Local 6 use self-addressed business reply cards (postage to be paid by addressee) for their authorization cards.

[45] G.C. Exh. 15 AJ.

[46] G.C. Exh. 15 BP.

[47] G.C. Exh. 13.

signed it and mailed them to the respective unions. On this testimony, I hold that Hyacinth signed a District 1199 card on June 19 and mailed it the same day, and signed a Local 6 card earlier. She, therefore, signed dual cards prior to June 22.

Ana Mercedes Lefkowitz, a Spanish-speaking employee, presently employed by Respondent, credibly testified that she was handed a District 1199 card outside Respondent's premises on Friday, a payday, before noon, by a lady who explained to her in Spanish what the card said, and that she, Lefkowitz, signed and dated it that day, June 19,and handed it back to the lady.[48] Lefkowitz then identified a Local 6 card as bearing her signature but she, admitted that she could not remember the surrounding details of her signing it.[49] I examined the signatures on both cards and found them to be the same. Therefore, I find that Lefkowitz signed a card for District 1199 on June 19, and a card for Local 6 on June 1, and I find that Lefkowitz signed dual cards before June 22.

Betty Rankin credibly testified that she worked for Respondent from March to July; that a lady working for District 1199 handed her a card; that she filled it out, signed and dated it June 5, at home;[50] but that she does not remember what she did with it thereafter. As for the Local 6 card, Rankin states that she received it in the mail; that her brother filled out the information on the card; that she signed and dated it May 19, and mailed it back to

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[48] G.C. Exh. 20.

[49] G.C. Exh. 15 CI, dated June 1.

[50] G.C. Exh. 10.

Local 6.[51] I find, therefore, that Rankin signed dual cards before June 22.

Lynn Richardson credibly testified that she signed two cards for District 1199 and one card for Local 6; that she received the first card from District 1199 in April; she signed and dated it and mailed it; that she signed Local 6's card in May;[52] that she filled out, signed, and dated a second District 1199 card in June, and handed it to Paynter.[53] I find that Richardson signed dual cards prior to June 22, one for Local 6 on May 25 and one for District 1199 on June 8.

Jennifer Spence credibly testified that while she worked for Respondent she received a card in the mail from Local 6; she filled it out, signed and dated it, and mailed it.[54] Later on, she received a card in the mail from District 1199. Because she had heard from a friend that District 1199 was a better union, she filled out that card, signed and dated it and mailed it.[55] I find from my examination of the cards that Spence signed the Local 6 card on May 6 and the District 1199 card on June 7. I hold, therefore, that Spence signed dual cards prior to June 22.

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[51] G.C. Exh. 15 DU.

[52] G.C. Exh. 15 DX.

[53] G.C. Exh. 25.

[54] G.C. Exh. 15 Z.

[55] G.C. Exh. 12.

Despite the efforts of Respondent and Local 6 to discredit the testimony of these six employees, I find their testimony plausible on its face and totally convincing and believable. And, it should be noted, that no evidence was produced by either Respondent or Local 6 to refute the testimony of these witnesses. Neither conjecture nor surmise can override their sworn, spoken words and their identification of the cards that they signed. And, except for Spence who said she favored District 1199, none of the other five employees expressed any preference for either union. On that basis I find that these six employees signed dual cards thereby affecting the majority status of Local 6. Of the 100 employees in the appropriate unit who signed cards for Local 6, 6 also signed cards for District 1199 before Local 6 was recognized as the exclusive bargaining agent of Respondent's home attendants. Under established Board law these six cannot be counted towards Local 6's majority.[56] Thus, Local 6 is left with 94 valid cards. It necessarily follows that Local 6 did not represent a majority of the 190 employees in the appropriate unit at the time they were recognized, i.e., June 22, 1981, and Local 6 was not, therefore, entitled to be the exclusive bargaining agent. By granting recognition under the circumstances, Respondent violated Section 8(a)(1) and (2) of the Act, and this is equally as true without regard to the Respondent's good faith.[57]

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[56] *Intalco Aluminum Corp.*, 169 NLRB 1034 (1968), enfd. 417 F.2d 36 (9th Cir. 1969).

[57] *Ladies Garment Workers (Bernhard Altman Corp.) v. NLRB*, 366 U.S. 731 (1961).

F. *The Collective-Bargaining Agreement Executed on June 24 and its Effect on the Unit Employees*

It is undisputed that on June 24, 2 days after Respondent extended recognition to Local 6, Respondent and Local 6 executed a collective-bargaining agreement containing a union-security clause and a dues-deduction authorization clause.[58] Rabbi Gruenwald testified that pursuant to that agreement, Respondent began deducting dues from the wages of home attendants in September 1981.[59] Inasmuch as Respondent's recognition of Local 6 on June 22 was invalid, Respondent's execution and enforcement of its collective-bargaining agreement with Local 6 was equally invalid. Under the circumstances, I find that Respondent has violated Section 8(a)(1), (2), and (3) of the Act, and I shall order Respondent to reimburse all present and former unit employees, except those who joined or signed authorization cards for Local 6 prior to the execution of the collective-bargaining agreement on June 24, 1981,[60] for moneys paid by or withheld from them on or after June 24, 1981, for initiation fees, dues, or other obligations of membership in Local 6,[61] with interest thereon computed in the manner described below in the remedy section.

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[58] G.C. Exh. 4.

[59] Hold-ons, employees working less than 20 hours, probationary employees, and a priest, were exceptions to this practice.

[60] This exception does not include the six home attendants whose Local 6 cards were invalidated by their signing dual authorization cards for District 1199.

[61] *Unit Train Coal Sales*, 234 NLRB 1265 (1978).

Conclusions of Law

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Local 6 and District 1199 are labor organizations within the meaning of Section 2(5) of the Act.

3. By recognizing Local 6 as the exclusive bargaining representative of its home attendants, at a time when Local 6 did not represent a valid majority of said employees, Respondent violated Section 8(a)(2) and (1) of the Act.

4. By entering into a collective-bargaining agreement covering Respondent's home attendants, which contains a union-security clause, at a time when Local 6 did not represent a valid majority of the home attendants, and by enforcing the union-security clause, Respondent has violated Section 8(a)(1), (2), and (3) of the Act.

5. The unfair labor practices enumerated above are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

The Remedy

As Respondent has been found to have engaged in certain unfair labor practices, I shall recommend that it cease and desist therefrom and that it take certain affirmative action designed to effectuate the policies of the Act.

I shall recommend that (1) Respondent withdraw and withhold all recognition from Local 6 as exclusive bargaining representative of its home attendants, unless and

until Local 6 has been certified by the Board as the exclusive collective-bargaining representative of home attendants; (2) Respondent cease giving effect to the June 24, 1981 collective-bargaining agreement it executed with Local 6, or to any extension, renewal, or modification thereof; nothing herein, however, shall authorize or require the withdrawal or elimination of any wage increase or other benefits or terms and conditions of employment which may have been established pursuant to the performance of that agreement; and (3) Respondent shall reimburse all present and former unit employees, except those who joined or signed authorization cards for Local 6 prior to June 24, 1981, for moneys paid by or withheld from them on or after June 24, 1981, for initiation fees, dues or other obligations of membership in Local 6,[62] with interest thereon computed in the manner provided in *Florida Steel Corp.*, 231 NLRB 651 (1977) (see generally *Isis Plumbing Co.*, 138 NLRB 716 (1962).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[63]

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[62] This is exclusive of the employees who signed dual authorization cards. See fn. 59, supra.

[63] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ORDER

The Respondent, Human Development Association, Brooklyn, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Recognizing or dealing with Local 6, International Federation of Health Professionals, International Longshoremen's Association, AFL-CIO, as the bargaining representative of its employees in the appropriate unit unless the unit Local 6 shall have been certified by the Board as the exclusive representative of such employees. The appropriate unit consists of:

> All home attendant employees employed by Respondent excluding all RN's, guards, clerical workers, personnel specialists and secretaries, guards and supervisors as defined in the Act.

(b) Assisting Local 6 in any manner to become the collective-bargaining representative of its employees in the aforesaid appropriate unit.

(c) Performing or giving effect to its contract of June 24, 1981, with Local 6, or to any modification, extension, supplement, or renewal thereof; to any dues-checkoff cards executed pursuant thereto; or to any other contract, agreement, or understanding entered into with Local 6 or its successor, relating to grievances, labor disputes, wages, rates of pay, hours of employment, or other terms and conditions of employment, unless and until said Union, or its successor, shall have been certified by the National Labor Relations Board; provided, however, that

nothing in this Order shall authorize or require the withdrawal or elimination of any wage increase of other benefits, terms, and conditions of employment which may have been established pursuant to the performance of said contract.

(d) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights guaranteed in Section 7 of the Act.

2. The following affirmative action necessary to effectuate the policies of the Act.

(a) Withdraw and withhold all recognition from Local 6 as the exclusive bargaining representative of its employees for the purpose of dealing with Respondent concerning grievances, labor disputes, wages, rates of pay, hours of employment, or other conditions of employment, unless and until the labor organization shall have demonstrated its exclusive majority representative status pursuant to a Board-conducted election among Respondent's employees, and shall have been certified by the Board.

(b) Reimburse all present and former unit employees, except those who joined or signed authorization cards for Local 6 prior to June 24, 1981, for moneys paid by or withheld from them on or after June 24, 1981, for initiation fees, dues, or other obligations of membership in Local 6, with interest thereon computed in the manner set forth above in the remedy section.

(c) Preserve and, on request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records,

timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this recommended Order.

(d) Post at its Brooklyn, New York place of business copies of the attached notice marked "Appendix B."[64] Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

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[64] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

LIST OF ELIGIBLE UNIT HOME ATTENDANTS EMPLOYED BY HUMAN DEVELOPMENT ASSOCIATION ON JUNE 22, 1981

Alfred J.
Alfred J.M.
Altman
Alvarez
Amato
Andrew
Arrington*
Ashby
Bailey
Barrow*
Barthelemy
Benjamin*
Berman
Boucher*
Brodsky*
Cabrera
Calo*
Campbelle
Carnegie
Castillo
Champegne
Clebert
Coats
Cohens*
Connell*
Craig
Cruz*
Cukierman*
Cyprien
Damato
Danielewski*
Decasseres*
Delgaudio
Deutsch*
Diaz, C.
Diaz, L.
Dolce
Donofrio*
Dorleans*
Dufont
Duperval*
Eastman
Edelstein
Edwards
Etienne*
Ewart*
Faustin*
Feldman*
Fernandez
Forbes*
Fortune
Fowler
Francois
Gayzler
Gonzales
Gonzalez
Goode
Goroberts
Grant, A.
Grant, B.
Greenberg*
Greenfield

Griffith*
Grossman
Grunzweig
Hanley*
Harper
Hayes
Hendy*
Hernandez
Herold
Herskowitz*
Hill*
Hills
Hirsch*
Hopkin*
Hughes
Hyacinth*
Jackson*
Jeffrey
Jerrick
Johnson, A.*
Johnson, J.*
Jolibois*
Jones
Karabas
Katz*
Kedsler*
Khaves
Khavkin
Kingston*
Klaynberg*
Klipper
Kogan*
Krashonsky*
Kuchmirowska*
Laguerre*
Lazarre*
Lefkowitz*
Lerouge*
Lewis, A.
Lewis, C.
Liburd*
Lopez
Louisaiare*
Lumpris
Lyublinsky*
MacDonado
Mann*
Manning
Marcel*
Martinez
Maxwell*
McCarthy
McDonald*
McLennan
Merzel
Mesquita
Michael*
Minto
Moontack*
Moore
Nakhmanovich*
Nieves*
Ovitsh*
Panya
Patrick
Paul, Patricia
Paul, Paulina*
Pereira*
Phillips
Pierre
Pointdjour
Porter*

Portnoy*
Potapousky*
Profis*
Proto*
Ramsaran
Rankin*
Rapaport
Reyes
Richardson*
Roitman*
Roldon*
Romero
Ronnie*
Rose*
Rosenberg*
Ross
Rouse
Sauage
Scheindel*
Scott*
Segal
Shamis
Shindman*
Silberman*
Sincilia*
Smith
Solomon*
Soto
Spence, J.*
Spence, S.*
Spira*
Stephen*
Stotland*
Strachan*
Sylvestre
Tarulli*
Toilia*
Thelot*
Theus*
Thomas*
Toe*
Tsivina*
Vasquez
Vernell*
Vitiello*
Voskoboynik
White*
Williams
Wilson*
Wint*
Yakir*
Young
Zakharyan
Zeitser

Meredith A. Fisher, Esq., for the General Counsel.

Carolyn H. Henneman, Esq. (Scoppetta & Seiff), for the Respondent.

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* Denotes names of employees who signed valid authorization cards for Local 6.

Sipser, Weinstock, Harper, Dorn, Leibowitz, Esqs., for the Charging Party.

William Perry, President, for the Party to the Contract.

Jonathan Walters, Esq. (Kirschner, Walters & Willig), for the Party to the Contract.

SUPPLEMENTAL DECISION

STATEMENT OF THE CASE

ARTHUR A. HERMAN, Administrative Law Judge. On 4 April 1985, I issued my decision in this proceeding, in which, inter alia, I asserted jurisdiction over Respondent. Thereafter, on 31 July 1986, the Board issued an order remanding this proceeding to me for further consideration of the jurisdiction issue, including if necessary, a reopening of the record, consistent with the Board's decisions issued on 24 June 1986, in *Res-Care, Inc.*, 280 NLRB 670, and in *Long Stretch Youth Homes*, 250 NLRB 678. On 12 December 1986, I advised the parties to this proceeding that after having re-read the record and the cases cited by the Board, I found the record sufficiently adequate to permit me to respond to the Board's remand without the necessity of reopening the record, and requested the parties to file briefs to aid me in my deliberations. Thereafter, counsel for the Charging Party submitted a letter in support of its position that the Board should assert jurisdiction over Respondent; the City of New York submitted a brief as amicus curiae to this proceeding, suggesting that the Board assert jurisdiction

over Respondent;[1] and Local 6 submitted a position statement and reply brief urging me not to assert jurisdiction in this proceeding.

On the entire record, I make the following

Findings of Fact[2]

Local 6 raised the jurisdiction issue at the hearing alleging that the City of New York, an employer exempt under Section 2(2) of the Act, exercises sufficient control over Respondent's labor relations so as to prevent Respondent from engaging in meaningful collective bargaining with Local 6, thereby extending the 2(2) exemption to Respondent and removing it from the Board's jurisdiction. The issue was fully litigated through the testimony elicited from Rabbi Gruenwald, Respondent's director, William Perry, Local 6's president, and Robert Schick, director of the Bureau of the Home Care Contract Services for The Human Resources Administration (HRA), a municipal agency of the City of New York.

The record in the instant case shows that all hiring and firing of home attendants, the collective-bargaining unit of employees involved, is done by the Respondent without any supervision or guidance by HRA, the exempt entity. Home attendants' qualifications are prescribed by

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[1] It is the close relationship between the City of New York and Respondent that forms the basis for this inquiry.

[2] The facts stated are in addition to those facts set forth in my prior decision, and together, they comprise the basis for my determination.

New York Department of Social Services and carried out by the City of New York.[3] The Employer must determine for itself whether an employee is qualified and it does not need nor get the approval of the exempt entity. Moreover, if the employer needs additional home attendants because of an increase in clients, the Employer does not need the exempt entity's approval to hire them.

Schick testified, without contradiction, that there are certain funding issues that are addressed in the purchase-of-service agreement that keep the city's liability to the Respondent within certain limits. He readily admitted that because the purchase-of-service agreement provides for reimbursement of expenses to Respondent by the city, the latter was naturally concerned with the amounts of money expended by Respondent. And, he stated that any collective-bargaining agreement arrived at between Respondent and Local 6 would have an economic effect on the monetary terms of the purchase-of-service agreement. However, Gruenwald testified that after he had completed negotiations with Local 6, at which the city was not present, he did not seek authorization from the city to enter into a final agreement, and no authorization by the city was required. Gruenwald's sole concern before signing such an agreement was to be certain that

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[3] The requirements are:

(1) Home attendants must be 18 years of age or older.

(2) They must possess a social security card.

(3) They must possess a basic fluency in English.

(4) They must be understanding of people and have a sympathetic attitude.

there was enough money in the budget portion of the purchase-of-service agreement to pay any negotiated increases to employees.

Schick further stated that additional items that concerned the city, and that would have an impact on the cost of the purchase-of-service agreement, included the amount of the lease that Respondent would sign for the premises it occupied, and the rental of computer services. Gruenwald pointed out that the purchase-of-service agreement limited, by a fixed amount, the money that Respondent could spend for the purchase of a piece of equipment. However, as long as the item's price was below the fixed amount, Respondent could buy as many of the items it wished without the approval of the city.

Perry introduced into evidence through Gruenwald, the fiscal year 1984 percent value of sample wage increases including fringe benefits for home attendants.[4] Gruenwald testified that this document was prepared by the city to aid Respondent, as a guideline in its negotiations with Local 6, and that Respondent could not go beyond the guidelines without the consent of the city. Schick readily admitted that the purchase-of-service agreement stated a specific monetary amount, known as the hourly reimbursement rate, which it hoped was not exceeded in a collective-bargaining agreement. In the event it was exceeded, HRA would inform the Respondent, or any other vendor, what the city's commitment was limited to in the purchase-of-service agreement, and advise the vendor that the city could not reimburse it for

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[4] Party to Contract Exh. 27.

the overage. Gruenwald contends that the city could veto any collective-bargaining agreement negotiated between Respondent and Local 6 that exceeds the guidelines, but Schick disputes that.

On cross-examination by the General Counsel, Gruenwald admitted that the guideline figure used in Party to Contract's Exhibit 27 could be split up in any manner agreed to by Respondent and Local 6, and that the guidelines do not discuss any noneconomic terms and conditions of employment.

Perry introduced into evidence, through Gruenwald, a series of letters and memoranda sent by either HRA of HDA to the other entity, aimed at showing the connection between the two. These consisted of letters by HRA approving the purchase of equipment,[5] permission given by HRA to all vendor agencies to increase salaries of nurses,[6] approval by HRA to HDA for the latter to shift funds in its line budget so as to hire a field security person,[7] and HRA's approval of the resume of a person for the position of assistant director for the field operations at HDA.[8]

The chief concern of Local 6 centered on the fact that because HRA assumed the entire responsibility of providing health benefits to all home attendants through Blue

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[5] Party to Contract Exhs. 16 and 23.

[6] Party to Contract Exh. 18.

[7] Party to Contract Exh. 17.

[8] Party to Contract Exh. 25.

Cross/Blue Shield, it deprived Local 6 of the right to discuss health benefits with Respondent during the course of their collective-bargaining negotiations. In this vein, Perry introduced into evidence the City of New York's projected costs for the home attendants' health insurance program [9] and Local 6's desire to negotiate the medical and hospital benefits with the City.[10] The city rejected Perry's request.[11]

Schick stated that the city held an informational meeting with the vendor coordinating Council and union representatives, to advise them regarding the cost of the city's health insurance program, but not to discuss whether the unions should take over the program.

Schick countered the testimony of Gruenwald and Perry by explaining the city's interest in the negotiations held between Respondent and Local 6. He stated that the city looks at the collective-bargaining agreement to see just what economic impact it will have on the purchase-of-service agreement that the city has with the Respondent. Schick admitted to having a conversation with Perry regarding two issues. He said Perry called him to find out how much of an increase there would be in the hourly reimbursable rate allowed by the city to Respondent in the purchase-of-service agreement, so as to give Perry an idea what he could bargain for in his negotiations with Respondent. Schick says he made it clear to

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[9] Party to Contract Exh. 21.

[10] Party to Contract Exh. 26.

[11] G. C. Exh. 45.

Perry that that issue was strictly between Local 6 and HDA, and HRA had no role in the negotiations. In the same conversation, Perry and Schick also discussed the status of some retroactive pay that was due Respondent's home attendants. Schick stated that there was no requirement that copies of communications between HDA and Local 6 be sent to HRA. Schick pointed out that even though the hourly reimbursement rate increase could not exceed a fixed percentage, no limitation was placed by the city on the Respondent as to how it was to be allocated. Schick further stated that HRA plays no role in disciplining Respondent's employees, nor in discharging, promoting, scheduling working hours, establishing size of work force, assigning home attendants, establishing work rules, or setting either a seniority or grievance system.

On cross-examination by Perry, Schick reiterated the fact that the purchase-of-service agreement between HRA and HDA defines the responsibilities of both, and that by signing the agreement they agreed to live within its boundaries. Thus, the agreement provides a dollars-per-hour reimbursement rate that HRA pays to HDA for the hours of service home attendants perform for clients. If there is money left over in the budget, and HDA did not exceed the limit set, HDA could give the employees more money up to the limit; however, if HDA exceeds the limit, HRA will not reimburse HDA. This is not to say that HDA set the employees' wages. Wages are negotiable, within limits, between HDA and Local 6. Schick further stated that HDA could sign a lease without showing it to HRA, but HRA will only reimburse HDA for the amount specified in the budget, which is part of the purchase-of-

service agreement. In addition, Schick pointed out that the purchase-of-service agreement provided that HRA has the right to purchase health care insurance for HDA's employees, which it did, but if there is a problem, HDA must contract the health care carrier directly.

Once a year, HRA monitors the quality of service being performed by the home attendants. If it is determined that the service is not up to standard, HRA notifies HDA to correct it. If, on reexamination, the situation is not corrected, HRA will not do anything in the particular case; but HRA will use it in an overall evaluation of HDA, and might not renew the purchase-of-service agreement.

Analysis and Conclusions

Based on the Board law at the time I issued my decision in this proceeding, as stated in *National Transportation Service*,[12] I decided to assert jurisdiction over Respondent. In *Res-Care, Inc.*, 280 NLRB 670 (1980), the Board reaffirmed the basic twofold test it had enunciated in *National Transportation Service*,[13] But it went a step further. The Board stated that from now on it would examine not only the control over essential terms and conditions retained by the employer, but also the scope and degree of control exercised by the exempt entity over the employer's labor relations, in order to determine whether the employer is capable of engaging in meaningful collective bargaining. And in *Res-Care*, the Board concluded that because the exempt entity retained the ultimate discretion for setting wage and benefits levels,

thus precluding the employer from engaging in a meaningful collective bargaining, it would not assert jurisdiction over the employer. The Board found that although the employer initially set the wage and benefit levels for each job classification in its operating budget, the budget required approval by the exempt entity and, once approved, it became the basis for the contract price. Moreover, the employer was required to obtain approval from the exempt entity of the wage ranges to be paid to the employer's employees, including a maximum for each classification and the substantive terms of several employee benefits. Also, the labor contract specifically provided that any proposed changes in the approved wage ranges or fringe benefit plans had to be submitted to the exempt entity for approval, along with any proposed changes in the staff manning table, labor grade schedule, or salary schedule.

On the very same day that the Board issued its decision in *Res-Care*, it also issued its decision in *Long Stretch Youth Home*, 280 NLRB 678 (1986), in which it discussed the very same issue, and in which it asserted jurisdiction over the employer. In *Long Stretch*, the Board found that

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[12] 240 NLRB 565.

[13] The twofold test is:

> (a) Is the employer an employer within the meaning of Section 2(2) of the Act?
>
> (b) Does the employer have sufficient control over the employment conditions of its employees to enable it to bargain with a union?

the exempt entity did not exercise ultimate discretion over wage and benefit levels. Although the employer does submit to the exempt entity, with its initial license application, minimum-maximum salary ranges, as well as other personnel policies it may have, the exempt entity does not maintain strict standards for the content of those policies and the employer largely determines for itself what those salaries and other policies will be. The Board stated that the exempt entity's salary ranges were merely guidelines, as was its policy of suggesting a percentage limit of the employer's budget for salaries. Also, the employer did not have to obtain prior approval from the exempt entity for changes in personnel policy. Another distinction drawn by the Board, as compared to *Res-Care*, is that in *Long Stretch* the wage and benefit levels approved by the exempt entity were not directly tied to funding. Even though *Long Stretch* submitted a proposed operating budget for review and approval each year of the exempt entity, the proposed salary ranges and benefit levels were not submitted with the budget, but with the initial license application and at reevaluation. Also, in *Res-Care*, the total salaries and benefits were one component of the employer's operating costs, and the total of the operating cost plus a fixed fee became the contract price upon approval of the employer's bid. Not so in *Long Stretch*. The Board found that the exempt entity had little or no control over the setting of salaries, the content of the benefits provided, or the content of other personnel policies, as long as *Long Stretch* satisfied minimum standards and qualifications. In addition, even though the exempt entity did exercise some control over the employer's hiring and firing, and did require that

employees meet certain minimum qualifications for certain positions, the Board found these to be *minimal* limitations on *Long Stretch's* authority and did not significantly limit its ability to engage in meaningful bargaining.

In the instant case, it is clear that HDA is not a Federal agency and thus is not exempt under Section 2(2) of the Act. It also is clear that HDA employs employees as defined in Section 2(3) of the Act. My only inquiry, therefore, goes to the question: Should I decline to assert jurisdiction because of the extent to which the City of New York, an entity exempt from the Board's jurisdiction, controls the employment conditions of HDA's employees? Is the relationship such as to prevent HDA from engaging in meaningful collective bargaining with Local 6?

Having examined the record and the current Board law as expressed in *Res-Care* and *Long Stretch*, I find that, unlike the employer in *Res-Care*, HDA does retain sufficient control over economic terms and conditions of employment to allow it to engage in meaningful collective bargaining. The creditable testimony of Schick established the fact that while the City of New York monitored HDA's performance in providing services under the purchase-of-service agreement, such monitoring consists largely of operational controls and is not so restrictive as to preclude HDA from engaging in meaningful collective bargaining. As stated by Schick, HRA only seeks to advise HDA and not to order it, and HRA cannot prevent HDA from signing a collective-bargaining agreement with Local 6. Moreover, HDA determines for itself the size and composition of its work force; it hires, promotes, and disciplines its employees without interference by the

exempt entity; it is free to bargain with Local 6 as to the nonmonetary terms and conditions of employment of the home attendants; and, within limits, it bargains freely with Local 6 with regard to wages and other economic fringe benefits. As stated by the Board at footnote 14 of its *Long Stretch* decision, "Courts have held that employers do not lack the freedom to bargain effectively over wages and benefits simply because they are subject to budgetary limitations because of their dependance [sic] on public funds. In the absence of specific limits on employee compensation expenditures, such as were present in *Res-Care*, the fact that the government entity places an effective ceiling on such expenditures by limiting the private employer's total budget is not the type of control over labor relations that would cause us to decline to assert jurisdiction. [Citations omitted.]"

In only one area, of HDA's employment relations does HRA have exclusive control, and that is health insurance. The City of New York contracts, on behalf of all home attendants, with a nonprofit private institution to provide them with health care services. This matter was the subject of discussion among the vendors, unions, and HRA, and no evidence was introduced to show that either the unions or the vendors were dissatisfied with the arrangement, or that some other arrangement would be more cost efficient. Under the circumstances, I do not find that the degree of control exercised by the exempt entity in this one area is sufficient to interfere with Respondent's ability to bargain in a meaningful manner with Local 6 regarding all other terms and conditions of employment of Respondent's home attendants.

In the instant case, I find that the general overall review exercised by HRA over HDA does not sufficiently deprive HDA of the ultimate control over essential terms and conditions of employment to preclude it from engaging in meaningful collective bargaining. I find that the actions of HRA do not rise to a level that impinges on either the day-to-day operations of HDA or on HDA's ultimate control of labor relations. Accordingly, I conclude that it will effectuate the purposes and policies of the Act to assert jurisdiction.

As a result of the foregoing supplemental findings of fact, and in light of the Board's decisions in *Res-Care* and *Long Stretch*, I reaffirm my original conclusion that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that the Board should assert jurisdiction over Respondent.

APPENDIX C

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 89-1551 **September Term, 1990**

Human Development Association,

Petitioner

v.

National Labor Relations Board

Respondent

BEFORE: Edwards, D. H. Ginsburg and Sentelle, Circuit Judges

ORDER

(Filed Sept. 23, 1991)

Upon consideration of the petitions for rehearing of petitioner and intervenor it is

ORDERED, by the Court, that the petitions are denied.

Per Curiam
FOR THE COURT:
CONSTANCE L. DUPRE, CLERK

BY: /s/ Robert A. Bonner
Robert A. Bonner
Deputy Clerk

Circuit Judge Edwards would grant the petition for rehearing of petitioner.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 89-1551 **September Term, 1990**

Human Development Association,

Petitioner

v.

National Labor Relations Board

Respondent

BEFORE: Mikva, Chief Judge; Wald, Edwards, Ruth B. Ginsburg, Silberman, Buckley, Williams, D. H. Ginsburg, Sentelle, Thomas, Henderson and Randolph, Circuit Judges

ORDER

(Filed Sept. 23, 1991)

The Suggestions For Rehearing *En Banc* of petitioner and intervenor have been circulated to the full Court. No member of the Court requested the taking of a vote thereon. Upon consideration of the foregoing it is

ORDERED, by the Court *en banc,* that the suggestions are denied.

Per Curiam
FOR THE COURT:
CONSTANCE L. DUPRE, CLERK

BY: /s/ Robert A. Bonner
Robert A. Bonner
Deputy Clerk